UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GOLDEN FARM BROOKLYN, INC. D/B/A
GOLDEN FARM GROCERY

and

Case Nos. 29-CA-112315
29-CA-114873
29-CA-118032

LOCAL 338, RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION, UNITED FOOD
AND COMMERICAL WORKERS

Emily Cabrera, Esq. and Naoki Fujita, Esq.,
Brooklyn, NY for the General Counsel.
Francis T. Coleman, Esq., Chevy Chase, MD
for the Respondent.
Eric LaRuffa, Esq. and Matthew Rocco, Esq.,
(Law Office of Richard Greenspan, PC),
Ardsley, NY for the Charging Party.

DECISION

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Local 338, Retail, Wholesale and Department Union, United Food and Commercial Workers (the Union) in Case Nos. 29-CA-112315, 29-CA-114873 and 29-CA-118032, filed on August 28, 2013, October 16, 2013 and November 26, 2013,[1] respectively, the Director for Region 29 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on December 10, alleging that Golden Farm Brooklyn, Inc. d/b/a Golden Farm Grocery (Respondent) violated Section 8(a)(1) and (5) of the Act by engaging in surface bargaining and withdrawing recognition from the Union, absent a showing that the Union had lost the unit's majority support, and notwithstanding the fact that the prior unfair labor practices committed by Respondent were unremedied and thus, tainted any showing that the Union had lost majority support.

The trial was held before me on January 29 and 30 and February 10 and 11, 2014.

At the opening of the trial, General Counsel, upon prior notice to Respondent, moved to amend the complaint to include allegations that "Steve" (last name unknown), a store manager, is a supervisor and/or agent of Respondent and that Respondent by "Steve" committed a number of 8(a)(1) violations on various dates between August and November and that one of these violations, an alleged promise to employees of additional hours of work if they signed a decertification petition, constituted more than ministerial assistance to employees in helping them get rid of the Union. General Counsel also moved to amend the complaint to request some additional remedies.

[1] All dates hereinafter are in 2013, unless otherwise indicated.

The motion to amend the complaint was granted, and the trial proceeded until it was closed on February 11, 2014, as noted above.[2]

Briefs were filed by General Counsel and Respondent. Subsequent to the receipt of the briefs, General Counsel sent a letter responding to Respondent's request in its brief to strike testimony of some of General Counsel's witnesses due to alleged inappropriate conduct by the interpreter used by General Counsel to translate the testimony of these witnesses. Thereafter, Respondent filed an objection to General Counsel's letter and motion for leave to file reply briefs. Respondent asserted, therein, that General Counsel's letter was tantamount to a reply brief, although no motion to leave to file a brief, as required, accompanied it and it should be rejected. Further, Respondent asserted that the accompanying brief, which it also filed, addressed the substance of General Counsel's letter as well as other matters raised in General Counsel's brief. Respondent contended that General Counsel's brief misstates the facts and mischaracterizes them to the point of undermining their entire argument in all issues. For these reasons, Respondent contends that it felt compelled to file the accompanying brief.

General Counsel, thereafter, filed an opposition to Respondent's motion, asserting that its letter was not a reply brief but rather a response to Respondent's request in its brief to strike testimony of all of General Counsel's Spanish-speaking witnesses and that its letter addressed this limited issue only and did not delve into any other assertion or argument put forth by Respondent in its brief. Therefore, General Counsel argued that this letter cannot be construed as a reply brief and should not be rejected.

Further, General Counsel contends that Respondent's request to file a reply brief should be denied since a mere desire to respond to "questionable contentions" in General Counsel's brief is not a legitimate ground upon which to file a reply brief. *International Harvester*, 227 NLRB 85, 88 (1976) at fn. 1.

Subsequent to this opposition, General Counsel wrote a letter to "correct an error" made in its post-hearing brief. This clarification appears to have been based on reading Respondent's reply brief, which pointed out a critical error in the date of a particular comment by "Steve," relied upon by General Counsel in its brief. As a result, General Counsel asserted that it had made an "inadvertent error" and revised its position as to the date of this comment by "Steve," and in effect, withdrew its assertion in its brief that this alleged statement by "Steve" tainted the decertification petition. General Counsel further argued that this change did not change other arguments in its brief that other unfair labor practices of Respondent and that Respondent lent more than ministerial aid to the decertification as a whole.

Based upon the above facts, I shall receive and consider all of the documents submitted, as detailed above. It is apparent that each side chose to respond to allegations made by the other in their brief and in these circumstances, I find it appropriate to receive and consider the documents as reply briefs or limited reply briefs and in the exercise of my discretion, I shall do so. *Coca-Cola Bottling Works*, 186 NLRB 1050, fn. 2, 20-16 (1970).

On the entire record, including the briefs and the reply briefs and my observation of the demeanor of the witnesses, I make the following:

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[2] After the hearing closed, General Counsel made a motion to introduce into the record documents submitted by one of Respondent's witnesses. The motion is granted and GC Exhibit 38 is received.

Findings of Fact

I. Jurisdiction

Respondent is a corporation with an office and place of business located at 329 Church Avenue, Brooklyn, New York, and has been engaged in the operation of a retail grocery store.

During the 12-month preceding period, Respondent derived gross revenues in excess of $500,000, purchased and received at its facility, products, good and materials valued in excess of $5,000 directly from suppliers located outside the State of New York.

Respondent admits, and I so find, that it is and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

It is also admitted, and I so find, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Representation Case: Case No. 29-RC-77022

On March 21, 2012, the Union filed a petition in Case No. 29-RC-77022, seeking to represent employees of Respondent. Pursuant to a stipulated election agreement, signed by the parties and approved by the Director, an election was conducted on May 2, 2012 of employees of Respondent in a unit consisting of all regular and full-time employees, including cashiers, clerks, stock persons, drivers and general merchandise handlers, employed by Respondent, excluding managers, buyers, office clerical employees, guards and supervisors.

The Corrected Tally of Ballots resulted in 13 yes votes, 8 no votes and 5 challenged ballots. Thus, challenges were sufficient in number to affect the results of the election.

The Union challenged the ballots of Young Chung Chun,[3] Jose Cuautle and Sharon Kim on the ground that they are supervisors within the meaning of Section 2(11) of the Act. The Union also challenged the ballot of Kim on the ground that she is a former owner of the employer and enjoys certain benefits due to her status as a former owner. The Union also challenged the ballot of Seung Seup Lee on the ground that this individual is not employed by Respondent. The Board agent conducting the election challenged the vote of Maria Gomez because her name did not appear on the *Excelsior* list. Thereafter, the Union and Respondent filed timely objections to conduct affecting the election.

On May 25, 2012, the Director issued a Report on Objections and Notice of Hearing, in which he directed a hearing be held before a hearing officer concerning the Union's challenges to the ballots of Chun, Cuautle, Kim and Lee, and the Union's allegation in the first objection that Respondent interrogated employees and directed that the ballot of Gomez be opened and counted.[4]

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[3] Young Chung Chun is the individual, referred to as "Steve" in the complaint as a supervisor and/or agent of Respondent.

[4] In order to safeguard the secrecy of Gomez's ballot, it was decided not to open and count that ballot until disposition of the remaining challenges or until at least one additional challenge was opened and counted.

Thereafter, on June 5, 2012, the Director issued a Supplemental Report upholding his original finding that Respondent did not establish that Lucas Sanchez is an agent of the Union and his conduct with regard to the election is properly analyzed as that of a third party. No exceptions were filed to the Director's Supplemental Report on Objections. Also, on June 5, 2012, the parties entered into a stipulation, wherein the Union withdrew its challenges to the ballots of Chun, Cuautle and Lee, and the parties agreed that these employees are eligible to vote and that their ballots be opened and counted. The parties further agreed that Sharon Kim was not eligible to vote and that the Union's challenges to her ballot be sustained. Finally, the parties agreed that Gomez was eligible to vote and her ballot be opened and counted. Accordingly, the ballots of Chun, Cuautle, Lee and Gomez were opened and counted and a Revised Tally of Ballots was issued on June 5, 2012. It revealed a final tally of 13 yes votes and 12 no votes and no challenges.

The hearing was held before a hearing officer of the NLRB on June 5, 2012 concerning the objections filed by the parties. At the hearing, the Union requested to withdraw all of its objections, which was granted by the hearing officer.

The hearing officer then proceeded with respect to Respondent's objections, which alleged that the conduct of Lucas Sanchez, who was an employee of NY Communities for Change (NYCC), a community organization, affected the results of the election. As noted above, the hearing officer analyzed the evidence presented based upon the Director's previous decision that Sanchez was not an agent of the Union and must be considered as third party conduct.

The hearing officer's reports subsequently issued on July 27, 2012, made the following findings:

> Documentary Evidence:
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> During a conversation more fully discussed below, Lucas Sanchez handed employee Alberto Lozada an 8 ½ inch by 11 inch size sheet of paper containing the letterhead, "NY Communities for Change," with Sanchez' name, phone number and his NY Communities for Change e-mail address on the bottom. (Tr. 70, 72, attachment to Union Ex. 1(a)) More specifically, the document indicates that, "The Kensington and Brooklyn community support workers from Golden Farm supermarket (329 Church Ave)," in connection with the workers "suing the owner, Mr. Sonny Kim, for back pay owed to them after having worked for many years earning well below the minimum wage." The above document states that, "New York Communities for Change is a coalition of working families in low and moderate income communities fighting for social and economic justice throughout New York State. We are working to ensure that every family throughout New York has access to quality schools, affordable housing and good jobs. It is through the power-in-numbers approach that NY Communities is able to win REAL change for our towns and neighborhoods. For more information call: Lucas Sanchez..."

Subsequently, the hearing officer considered and did not credit the testimony of employee Lozada that Sanchez offered him money if he voted for the Union but credited Lozada's testimony that he had a conversation with Sanchez, where money was discussed, but the discussion related to money from the lawsuit, which was referred to in the leaflet given to Lozada by Sanchez, described above.

The hearing officer also evaluated testimony from employees Francisco Gomez, wherein Sanchez on March 4 or 5, 2012 told Gomez about a lawsuit at a store called “Master Food” and that the employees at Master Food had won already and urged Gomez to participate in the lawsuit. Gomez asked Sanchez how much money was mentioned, and Sanchez replied, “You’ve been here a while. He said from $8,000 down.” Gomez testified that he believed that this was because he wasn’t paid the right amount for his wages. Notably, the hearing officer did not credit Gomez’s testimony that Sanchez had mentioned the Union in connection with their conversations.

The hearing officer recommended that the Respondent’s objections be overruled based on the following analysis:

DISCUSSION:

> In third party cases involving threats, the Board will not overturn election results unless the third party's conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel,* 270 NLRB 802, 803. In third-party cases not involving threats, the Board has rephrased the standard, to evaluate 'whether the conduct at issue so substantially impaired the employees' exercise of free choice as to require that the election be set aside.' See e.g., *Hollingsworth Management Service,* 342 NLRB 556, 558 (2004) (where electioneering by nonparties was evaluated). The Board has noted that this heightened standard for objections based on third-party conduct reflects a recognition of the unfairness of saddling parties with the consequences of conduct over which they had no control. See *Independence Residences,* 355 NLRB No. 153 (2010).
>
> The credited evidence presented at hearing shows that on March 4 or 5, Lucas Sanchez, had a conversation with employee Francisco Gomez wherein Sanchez spoke about Master Food. Sanchez also discussed money which Gomez believed was related to him not being paid the right amount for his wages, i.e., back pay. Since the evidence does not clearly show that this conversation took place after March 7 (the filing date of the earlier petition), the conversation took place outside the critical period. Accordingly, inasmuch as the evidence does not clearly establish that the aforementioned conversation took place during the critical period, it is not objectionable. *Ideal Electric and Manufacturing Company,* 134 NLRB 1275 (1961). Additionally, the credited evidence presented at hearing shows that in about mid-March, Lucas Sanchez had a conversation with employee Alberto Lozada. Contemporaneously, Sanchez gave Lozada an 8 ½ inch by 11 inch size sheet of paper containing the letterhead, "NY Communities for Change," with Sanchez' name, phone number and his NY Communities for Change e-mail address on the bottom. More specifically, the document indicates that, "The Kensington and Brooklyn community support workers from Golden Farm supermarket (329 Church Ave)," in connection with the workers "suing the owner, Mr. Sonny Kim, for back pay owed to them after having worked for many years earning well below the minimum wage." The above document states that, "New York Communities for Change is a coalition of working families in low and moderate income communities fighting for social and economic justice throughout New York State. We are working to ensure that every family throughout New York has access to quality schools, affordable housing and good jobs. It is through the power-in-

numbers approach that NY Communities is able to win REAL change for our towns and neighborhoods. For more information call: Lucas Sanchez..." The leaflet was in English; it was the only document Sanchez gave Lozada. As noted above, I do not credit Lozada's testimony that Sanchez offered him $2,000 for supporting or voting for the Union, as a reliable complete accounting of the facts. In the circumstances of this case, where Sanchez handed the NY Communities for Change leaflet to employee Lozada at the time of their conversation, it would be reasonable to conclude that Sanchez discussed money in connection with the lawsuit and back pay referred to in the leaflet. This is also consistent with employee Gomez' testimony that indicated he believed the money Sanchez referred to in their March 4th or 5th conversation was related to him not being paid the right amount for his wages, i.e., back pay owed. In this regard, I note that the Board has recently held in *Stericyle, Inc.,* 357 NLRB No. 61 (2011), that a union engages in objectionable conduct warranting a second election by financing a lawsuit *filed during the critical period* which states claims under Federal or State wage and hour law claims on behalf of employees in the unit. Here, there is no evidence that the lawsuit referred to in the leaflet was filed by the Union or a third party during the critical period.[22] Moreover, even assuming Sanchez, a third party, promised to file a lawsuit on behalf of Lozada, in the circumstances of this case, I do not find such a promise would be objectionable. In this regard, a promise to assist an employee concerning his rights under labor laws or to improve his terms and conditions of employment is clearly distinguishable from objectionable union conduct which bears no connection to the employer-employee relationship. Further, Lozada testified that when Sanchez mentioned the $2,000 to him, he declined and stated that he preferred working. Lozada also testified that Jose Cuautle, the only other employee that knew about his conversation with Sanchez, also indicated no interest in Sanchez' offer. Accordingly, there does not appear to be evidence that such a promise substantially impaired the exercise of free choice.[23] Compare *Hollingsworth Management Service,* 342 NLRB 556, 558 (2004).

SUMMARY AND RECOMMENDATIONS

Based upon the findings of fact, credibility resolutions, and discussion of the applicable legal principles, it is recommended that Employer Objection Nos. 1 and 2 be overruled. I further recommend that the request for withdrawal of the Petitioner's allegation in its first objection that the Employer interrogated employees prior to the election, be approved. As the Tally of Ballots shows that a majority of the valid votes counted has been cast for the Petitioner, it is recommended that a Certification of Representative be issued.

[22] The Employer would be in a position to know who filed a lawsuit against it and when it was filed.

[23] Although the conversation between Sanchez and employee Gomez took place outside the critical period, I note that Gomez also testified that he told Sanchez that he was not interested in the money. (Tr. 95)

No exceptions were filed to the hearing officer's report, detailed above. Accordingly, the Board, on September 20, 2012, accepted the hearing officer's findings and recommendations and issued a certification of representatives of the Union as the representative of Respondent's employees in the unit, detailed above, on that date.

IV. The NYCC Boycott

In June of 2011, NYCC assisted employees in filing a lawsuit against Respondent as well as against Sonny Kim, its owner, individually for alleged violations of the Fair Labor Standards Act. The lawsuit was filed as a class action in federal district court in the Eastern District of New York on June 20 and assigned to Judge John Gleeson. It alleged that Respondent failed to pay statutory minimum wages as well as failed to proper required overtime pay to its employees.

Ultimately, a settlement stipulation was agreed upon by the parties, wherein Respondent agreed to pay an undisclosed sum of money to its employees.[5]

The lawsuit generated a significant amount of public interest, which resulted in a boycott of the store and its supporters, including NYCC and another community agency called Occupy Kensington. The boycott included leafleting, protesting and some entry into the store by protestors attempting to pay for items with pennies and disrupting the store.

According to Sonny Kim, the picketing and demonstrations occurred at Respondent's store started in March of 2011. Kim testified that three representatives for NYCC and Occupy Kensington would bang on drums and buckets in front of the store, come inside the store with drums and buckets banging, would yell and scream at customers and at Respondent's cashiers, and while in the store, would attempt to purchase items with bags of pennies and would leave carts in the aisles filled with goods that they did not even try to check out. He further testified that he had to call the police because of the confrontation between a demonstrator and one of Respondent's cashiers.

In September of 2012, Respondent filed a complaint in the Supreme Count Kings County against NYCC and Lucas Sanchez, alleging various causes of actions, including trespass, private nuisance and tortuous interference with its relationship with its customers. In connection with that complaint, Respondent filed a motion with the court for a preliminary injunction along with an affidavit from Sonny Kim in support of the injunction request. In the affidavit, Kim asserts that NYCC and Lucas Sanchez as well as other supporters, who are agents and supporters of NYCC have since October of 2011 been engaged in “a malicious campaign to disrupt, interfere with, injure and frustrate Golden Farm’s business by conducting improper, unlawful and unreasonable demonstrations in or around the private property.

Kim’s affidavit as well as its attorney’s memorandum in support of Respondent’s request for an injunction asserts that the defendants have assembled since October of 2011, a least once a week and increased in the past month to 2 or 3 times a week and demonstrated for 5-8 hours at a time, with picket signs, loud drums, whistles, sticks and other noisemaking instruments. It is further alleged that demonstrators often parade into and throughout the store harassing Respondent's customers, littering the floor with flyers and leaflets, blocking customers and workers from accessing entrances, aisles and check-out registers as well as blocking Respondent’s customers from entering and existing the store. It is also alleged that excessive noise created by the defendants’ drums and whistles was significantly disruptive to Respondent’s business and that they frequently harass and intimidate customers, who enter the store by following them throughout the store and while making angry and offensive remarks.

[5] The stipulation of settlement was approved by Judge Gleeson, after he denied a motion to place the agreement under seal, on March 19, 2013, wherein he issued an order dismissing the case based on the settlement agreement.

Finally, it was alleged that Respondent was on many occasions required to call the local law enforcement to have defendants removed from the property. Kim also asserts in his affidavit that since the demonstrations began in October of 2011, the number of customers of Respondent has significantly decreased and the volume of sales has decreased by 20%.

The record reflects that as a result of these documents, Respondent was able to obtain a court order stating that protestors must stay 5 feet away from Respondent's fruit table.

On November 28, 2012, Kim sent the following letter to the police department in Brooklyn, NY in regard to the demonstrations and the above court order, which he asserts has been violated. The letter is as follows:

> Commanding Officer, Patrol Borough Brooklyn South
> 2820 Synder Avenue
> Brooklyn, NY 11226
>
> 11/28/12
>
> Dear Chief Chan,
>
> My name is Sonny Kim, the owner of a grocery store located at 329 Church Avenue, Brooklyn NY. I am writing this letter seeking assistance from the Police Department.
>
> For last two years, I have been dealing with a boycott by Community for change and Local 338. The organizers and the participants have been harassing me, worker and customers who continue to support my store.
>
> I went to a court and received stipulation from by Judge Sweeny blocking the anyone participating in the boycott come within 5 feet of the store or impede any pedestrian traffic.
>
> The local 338 and the community for change were served with the court paper but continue to violate the court order.
>
> I have been calling 911 numerous times to seek the police protection. However, when the police comes, officers often leave without taking any police actions. I tried to show officers video recording that show how these union people severely violate the court order. Officers seemed not interested in looking at the video but just tell these people to stay away from my store.
>
> Of course when the cops show up, they don't do anything that violates the court order. However, they continue to harass by blocking the entrance shouting and yelling.
>
> I am attaching the copy of the court order and some of images that show that these people are violating the court order. Please help me and help my workers to work without any harassment.
>
> You can contact me at 718-530-3665. Thank you.

Sincerely,

Sonny Kim

C: CO 66 Precinct

I note that this letter makes a reference to Local 338 (the Union, herein) as having been involved in the boycott and in harassing his customers and workers and asserts that "Local 338 was served with the court paper," However, neither of the documents submitted in connection with the injunction (Kim's affidavit) and Respondent's attorney make any reference to the Union or Local 338 whatsoever and does not assert that the Union was involved in the allegedly unlawful conduct of NYCC.

It is apparent from Kim's testimony that he believed that there was union involvement in the boycott. Indeed, as further evidence will establish below, Respondent continually asserted during bargaining with the Union that the Union was participating in the ongoing boycott and in fact, demanded that the Union persuade NYCC to cease the boycott and demonstrations. Indeed, one of the complaint allegations, to be detailed more thoroughly below, alleges that Respondent conditioned bargaining over economics on the Union being successful in ending the boycott and demonstrations, an alleged non-mandatory subject of bargaining.

However, no probative evidence was presented of any union involvement in the boycott. Indeed, as will be detailed below, whenever Respondent brought up that subject at bargaining, the Union denied any involvement or participation in the boycott and stated to Respondent's representatives that the Union opposed such conduct.

The Union's field director and representative, Jack Caffey, testified that the Union was not involved in the boycott or demonstrations and that he had made a number of unsuccessful attempts to persuade Sanchez and representatives of Occupy Kensington to stop such activities. However, these individuals initially refused to stop and chided the Union for not joining in the demonstrations.[6] Caffey also testified that the Union had initially been contacted by NYCC representatives and been informed about the lawsuit filed by employees of Respondent and sponsored by NYCC and that Respondent had paid out $400,000 in back wages. Caffey was further informed that harassment of employees was going on and that NYCC was afraid that workers were going to be retaliated against. Thus, NYCC thought it would be a good idea to have a union in the shop and introduced the Union to the employees. As will be also detailed below, Caffey continued to press NYCC and Occupy Kensington to cease the boycotting activities and finally in March of 2013 was successful in persuading these groups to "suspend" the boycott activities and demonstrations. The boycott and demonstrations did not resume.[7]

[6] Immediately, after the certification in September of 2012 and before negotiations, Caffey, on his own, contacted Sanchez and asked him to stop the boycott and picketing. He informed Sanchez that the Union was going to start negotiations, and he did not think it's a good thing to have pickets in front of the store while the Union was negotiating and asking for raises. Sanchez replied that workers were being harassed because of the lawsuit, and he would not stop the boycott.

[7] As will be detailed below, in September, after negotiations broke down, the Union started picketing, utilizing a "rat" outside the store with two union representatives. No employees of Respondent or NYCC were involved in this activity.

V. The Negotiations

The first negotiation session was held on November 28, 2012 at the Williamsburg Diner. Present were union attorney Eric LaRuffa and union director Jack Caffey. Present on behalf of Respondent were Sonny Kim, labor consultant Joe Mieluchowski and Ron Pfeiffer, Respondent's attorney. Prior to this meeting being scheduled, Caffey has asked Pfeiffer about arranging a negotiation session with Respondent, in view of the certification. Pfeiffer responded to Caffey that Sonny Kim did not want to meet with the Union because of the boycott and demonstrations. Caffey replied that the Union had nothing to do with the demonstrations or the boycott and reminded Pfeiffer that the Union was certified and wished to commence negotiations.

Sometime after that conversation, Pfeiffer got back to Caffey and agreed to the initial bargaining meeting, as set forth above, on November 28, 2012. Caffey began the meeting by stating that Union wanted to put the “bad blood” behind them and move forward in an amicable way.

Pfeiffer brought up the boycott and stated that Kim believed that the Union was involved, and Kim was upset that Respondent was losing money as a result. Caffey assured Respondent’s representatives that the Union was not supporting, advocating or condoning the boycott.

Caffey handed Respondent’s representatives a typical industry agreement that the Union had with some other small stores and stated that it would not put Respondent out of business.

Apparently, prior to this meeting, the Union had filed an unfair labor practice charge, alleging that Respondent imposed a disciplinary policy that had not been in place prior to the certification without bargaining with the Union. Pfeiffer addressed that issue and asserted that it was difficult to manage the store if Respondent had no disciplinary policy, for example, theft or drinking on the job, so it needed a disciplinary policy to be able to operate without too much disruption. Pfeiffer gave the Union a list of infractions, such as stealing, gambling on the job and drinking, where it needed to be able to discipline employees. Caffey responded that the Union would take a look at the list, and the Union would respond to it during the negotiations.

The parties met again on January 28 at a Marriott Hotel, near La Guardia Airport. At this meeting with the same participants present, the Union presented a 15-page comprehensive contract proposal. Thereafter, the parties negotiated based on this proposal and the Union’s attorney and negotiator LaRuffa would make annotations on the document indicating what was agreed upon, what was still open and what counter proposals, if any, were presented to each union proposal.

At the January 28 meeting, both Pfeiffer and Mieluchowski make similar comments about the negotiations and the boycott. They asserted that Kim was claiming that he was losing money because of the boycott and that he (Kim) was very angry about it. Therefore, he (Kim) would not agree to discuss any economic issues until the boycott stopped.

Caffey reiterated that the Union as not involved in, did not participate in and was not supporting the boycott.

The Union attempted to discuss some of the economic items in their proposal, such as vacations and holidays. Respondent’s representatives responded that Kim was not even

approachable about these issues because of the boycott.

The parties then discussed some of the non-economic items in the Union's contract proposal. Paragraph 2(a) of the proposal, union recognition, provided that Respondent recognizes the Union as the exclusive collective bargaining representatives of its employees. Mieluchowski replied that Kim had a problem with that and he did not want to recognize the Union as the exclusive bargaining representative for its employees. The Union's representatives replied that this is unfortunate, but Respondent was going to have to recognize the Union, in view of the certification.

The Union's proposals for a union security clause and checkoff were also discussed. Respondent representatives rejected both of these proposals, stating that it was up to the employees to decide if they wanted to join the Union or not and that if the Union wanted to collect dues, they could collect it themselves.

The Union's proposal on union visitation (Article 12), provided that the Union's representatives may visit the store as long as the visit does not disrupt the regular business operations. Respondent's representatives rejected this proposal, stating that Respondent did not want a union representative or any type of agent of the Union at the facility.

The Union proposed a clause, entitled Shop Stewards (Article 13), which provided that the shop steward is the representative of the Union, and the Union may appoint a shop steward in the store as well as a request that the steward be given a day off once a year to attend the Union's shop steward conference.

Respondent's representatives' response was that Respondent wanted to appoint the shop steward because it did not want to deal with the Union. The Union representatives replied that it is not Respondent, who chooses the steward, but the Union chooses its shop steward. Respondent's representatives repeated that Respondent wanted to choose the shop steward and wanted to deal only with that steward because it did not want to deal with the Union.

The parties next met on February 13 at the same Marriott Hotel. Tom Coleman was Respondent's attorney and represented Respondent at this meeting as well as at subsequent sessions. At this meeting, the Union submitted a revised proposal to Respondent, which was discussed in part. Respondent, at this meeting, agreed to recognize the Union (Paragraph 2(a)) as the collective and bargaining representatives of the employees.

Paragraph 2(b), Union security, was discussed. Respondent's representatives stated that Kim would not agree to it because he did not feel that employees should be required to be made members of the Union. Respondent's representatives repeated its previous opposition to the Union's checkoff clause, stating that Kim would not agree to it because he believed that if the Union wanted that, they should get it themselves.

The Union attempted to discuss wages, but Respondent's representatives stated that Kim was reluctant because of the boycott, and Respondent would not talk about wages or any economic issues until the boycotts are down. Caffey replied again that the Union did not want the boycott, was not involved and that it cannot control a third party. Respondent's representatives repeated that they would not discuss any economics until the boycotts are down.

The Union's proposal on visitation was discussed as well, and once again, Respondent rejected it, stating that Kim did not want any union representatives in his store.

The shop steward clause was also discussed, and once again, Respondent's representatives stated that Kim wanted to appoint the shop steward, and that was the person that Kim wanted to deal with. LaRuffa and Caffey responded that the Union was responsible for selecting the shop steward, and Respondent should have no role in that decision.

The parties also discussed the Union's arbitration proposal (Article 18), which provides for arbitration, if the parties do not or cannot meet within 15 days of the dispute or if they are unable to adjust the dispute between themselves. Respondent did not want to agree to go to arbitration immediately, and the Union agreed that the parties should meet before arbitration is scheduled, as provided for in their proposal. Respondent's representatives replied that it wanted to deal only with the shop steward on all grievances and not the union representatives. The union representatives responded that normally the shop steward is not involved in the grievance procedure at that level and that Respondent must meet with the union representative on the grievance. LaRuffa added that the shop steward could file a grievance but that the union representative must be the one, who Respondent deals with on grievances, prior to the arbitration being scheduled.

The parties then turned to discussing the disciplinary policy that Respondent had proposed implementing. Caffey, on behalf of the Union, stated that the Union was hesitant to sign off on a point system, as Respondent had proposed. Caffey also commented why should the Union agree to a disciplinary policy when Respondent has a store manager, Steve, who has been browbeating, harassing and threatening employees and generally giving the employees a hard time. Mieluchowski responded, "We know he's a problem."[8]

The next negotiation meeting was on March 22 at the Marriott Courtland Hotel. During the previous session, Caffey had urged that Respondent bring Sonny Kim to the negotiations, so that the Union could explain to him that it was not responsible for or participating in the boycott and that it was trying to have the boycott end.

At the March 22 meeting, Kim was in attendance along with Coleman and Mieluchowski, plus an individual introduced as a partner of Kim, who was present for part of the meeting but said nothing.[9]

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[8] My findings with respect to this latter discussion are based on a compilation of the credited portions of testimony of Caffey, LaRuffa, Coleman and Mieluchowski. I do not credit the testimony of Caffey that both Coleman and Mieluchowski admitted that Steve was a manager (which was not corroborated by LaRuffa) nor Mieluchowski's testimony (not corroborated by Coleman) that Mieluchowski specifically stated that Steve was not a manager. Rather, I find, as I related above, that Mieluchowski responded, "We know he's a problem," as testified to by both LaRuffa and Caffey, and not denied by Coleman. I also note, in this regard, Mieluchowski's negotiation notes, reflected as follows: "Union informed me that Steve (Management) told employees that support the Union the company had guys lined up to replace them." There is nothing in the notes that reflected that Respondent disputed Steve's status as management.

[9] The individual was named Joong Yun. According to Kim's testimony, Yun is actually the sole owner of Respondent and that Kim is now only the manager. According to Kim, he was the owner of Respondent until 2009, when he sold it to Yun and that since that time, Kim has been the manager and Yun the owner. Kim did not dispute the testimony of the union witnesses, as described above, that Respondent identified Yun as a "partner" of Kim at the negotiations. Further, Kim testified that he is only the "manager" and that he essentially makes all major decisions, such as running the store, dealing with employees and making decisions concerning

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Kim stated, at the meeting, that he was very angry about the boycott and that he believed that the Union was involved and supporting it, and that he was drawing a line in the sand and would not discuss economics because of the boycott. Caffey replied, "Let's try to be civil." Kim answered that he would not be civil until the boycott is over with.

Caffey insisted that the Union was not doing this boycotting, was not participating or supporting it, and in fact, had made efforts to get the people, who were involved in the boycott to stop it. Caffey specifically informed Kim that he had made calls to Sanchez of NYCC and explained to Sanchez that NYCC needed to pull the boycott because of the detrimental effects on the negotiations.

Kim answered by repeating his prior comments about "drawing lines in the sand" and added that he had no intention of attending any other sessions. At that point, Kim and Yun left the meeting.

The remaining participants (LaRuffa, Caffey, Coleman and Mieluchowski) turned to discussing non-economic issues, such as union security, checkoff and union visitation. The position of Respondent was the same as it had been previously. Respondent rejected the Union's proposals, stating that it did not want to force people to join the Union and that it was up to the Union to convince employees to become members, and that if the Union wanted dues, they could collect it directly from the employees. Respondent also reiterated that it did not want any union agent or organizer on the premises at any time.

The subject of shop stewards was again discussed, and Respondent agreed that the Union would be able to select the shop steward, as opposed to Respondent's prior position that Respondent could decide who the shop steward would be. However, Respondent continued to insist that the shop steward be the union representative involved in the grievance procedure and that it would not allow the union representative access to the store for any purpose, including meeting to discuss grievances.

During this meeting, Respondent's representatives proposed that the duration of the contract be for one year from the date of the contract's signing and ratification. The Union had proposed a three-year agreement.

Shortly after this meeting, Caffey and the union officials again spoke to Sanchez and were able to persuade NYCC (and Occupy Kensington) to suspend the boycott.

The parties met again in early April. Caffey began the meeting by stating that the Union had been able to convince NYCC and Occupy Kensington to suspend the boycotts, "to see how things went" and that the Union expected to start discussing economics.

Respondent's representatives responded that because of the boycott Respondent had lost business so that it could not make any offers on wages or other economic issues due to the impact of the boycott on its business.

The discussion then turned to open non-economic items, such as union security, checkoff and visitation. Respondent adhered to the same position that it had taken at the previous sessions with respect to these issues. Respondent did not believe that it should have

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the bargaining.

to compel anyone to join the Union if they don't want to and if employees wanted to join the Union, the Union can go collect dues from the employees. They repeated that Respondent did not want a union staff member on its property.

While Respondent agreed that the Union could select the shop steward, it continued to insist that Respondent would deal only with that shop steward during the grievance process since Kim did not want to deal with union representatives.

The parties agreed to the Respondent's proposal for a temporary disciplinary policy to be in effect for the period of negotiations.

Subsequent to that meeting, on April 10, Mieluchowski sent LaRuffa an email, attaching the agreed upon language on the temporary disciplinary policy that the parties agreed upon to be effective only for the period of negotiations, so management could run its store. The email requested that the Union sign off and return it to Mieluchowski. Ultimately, the Union executed this document.

The parties next met on June 2 with the same individuals present. The Union presented a new wage proposal, modifying its previous request for wage increases.

Respondent's representatives rejected this modified proposal of the Union, reiterating its previous position that due to the impact of the boycott, it was not prepared to offer any wage increases to the employees.

The parties did discuss other items in the Union's proposed contract, including some economic issues such as vacation, holidays, funeral leave and sick days. Respondent made counterproposals on each of these items, and the Union made some additional counterproposals.

The parties agreed upon Article 16 of the Union's proposal, as modified, entitled Funeral Leave. The agreement was that all employees, who, after completing 150 actual working days, have a death in the immediate family, shall be entitled to two consecutive working days off with pay. Immediate family is defined, and the employees shall provide proof of death upon request when they return to work.

No agreements were reached on the other economic issues discussed, such as vacations, holidays and sick leave although, as noted, Respondent did submit counterarguments on these subjects and discussed them with the Union as well as some additional counters from the Union on these matters.

I note that Respondent had been providing no current benefits with respect to any of the above items.

After that meeting, on June 18, LaRuffa prepared a document, which reflected his summary of where the parties stood on each issue. It consisted of the Union' proposed agreement and indicated where there were agreements and what were the open issues and the counterproposals on each of the outstanding issues. He forwarded this document to Mieluchowski, who emailed LaRuffa back a response, dated June 23. This email from Mieluchowski thanked LaRuffa for the email, commented that LaRuffa had done a good job in summarizing the state of negotiations and stated that he had three minor corrections to make, which Mieluchowski highlighted. The email added that if LaRuffa and Caffey feel that the highlighted areas must be discussed, please advise and a conference call can be worked out.

Otherwise, Mieluchowski suggested that calendars be compared and a meeting scheduled. One of the highlighted areas in Mieluchowski's email referred to Article 18 was the arbitration provision and referred to Respondent's counterproposal of referring to Respondent's meetings with the shop steward and then if the grievance is not resolved after the request of either the Employer or the Union, the Employer and the Union shall meet within 15 days, and if they cannot reach agreement, the dispute shall be submitted to arbitration.

The Union's proposal on arbitration made no mention of any role for the shop steward and reflected that the Employer and the Union shall endeavor to meet within 15 days after Respondent is advised of a dispute. It further states that if the parties did not meet within 15 days Respondent is advised of the dispute and the parties are unable to adjust the differences between themselves, the dispute shall be submitted to arbitration.

The parties met again in July. Caffey stated that the Union needed to get a wage increase for the employees. The Union offered to sign a one-year contract if the wage increase was 50 cents an hour in that year or alternatively a three-year contract with a 40-cent raise the first year and $1.00 over three years.

Respondent rejected that Union's proposals, stating that due to the impact of the boycott, it was proposing a wage freeze.

The parties discussed all items in the Union's proposed contract and indicated which items were and had been agreed to and where the parties stood on each proposal. They included Respondent's offers on some economic issues, such as holidays, vacation and sick leave. In that regard, Respondent proposed after one year of employment, employees would receive one paid holiday, and after twenty-four months, two holidays, after three years of employment, they would be entitled to five vacation days, and after ten years, ten days, and after working three years, employees would receive one sick day.[10]

Other items discussed included leave of absence, overtime work hours, seniority and management rights, which were or had been agreed upon previously.

Union security, checkoff and union visitation were also discussed, and Respondent again rejected these union proposals for the same reasons expressed in the previous sessions, including that it did not want to deal with the Union at the store.

After that meeting, LaRuffa prepared another document which he sent to Mieluchowski, summarizing LaRuffa's view as to the parties' positions and the status of negotiations at that time after the July meeting. This document reflected that the parties had reached agreement on the following items:

Article 1(a)(b)(c)(e) and (f) only – Definition and Coverage

[10] The Union proposed all employees employed for six months shall be entitled to five paid holidays, and then counterproposed all employees employed for twelve months received these holidays. On vacations, the Union maintained its proposal of five days vacation pay for employees employed between one and seven years, ten days for employees employed between seven and twenty years, and fifteen days for employees employed for twenty years or more.

The Union had requested three sick days per year for all employees employed one year or more.

Article 2(a) only – Union Recognition and Union Shop
Article 3(a)-(d) – Probationary Period and Tenure of Employment
Article 4 – Hours of Work
Article 6 – Overtime Pay
Article 9 – Management Rights
Article 10 – Individual Agreements
Article 13 – Shop Stewards
Article 14 – Benefit Returns
Article 16 – Funeral Leave
Article 17 – Leave of Absence
Article 18 – Arbitration – except the issue of what the shop steward's role would be
Article 19 – Severability

With respect to the arbitration proposal, Article 18(b), the clause agreed upon by the parties contained the identical language in the Union's proposals. That is no reference is made to the shop steward or the shop steward's role in the arbitration process. LaRuffa included a statement in his document, "dispute remaining over the shop steward's role in the procedure." In his testimony, LaRuffa explained that while there had been an agreement that the shop steward would not have to be included in the steps of the grievance procedure since the Respondent was still insisting that the union representatives had no access to the store, there was still an issue remaining to be resolved, which the Union viewed as pertaining to the arbitration clause. Essentially, LaRuffa appears to be asserting that since the Respondent was refusing to allow the union representatives on the premises that the Employer would be unable to meet with the Union within the 15 days specified in the grievance procedure.

On August 23, the parties' next, and ultimately, last negotiation session was conducted by conference call. The parties discussed the updated proposal and some of the open issues. Mieluchowski stated that Kim did not want to pay anyone while they didn't work, which led to a limited discussion and no agreements on the open issues, such as vacations, sick days and holidays.

The subject of wage increases was discussed. Respondent was still insisting on a wage freeze. The parties mentioned that the minimum wage would be going up by law, as of January 1, 2014.

Caffey stated that the Union was interested in a contract with raises, effective immediately, and wanted to also resolve all open issues, including union access, union security and dues deductions.

Respondent's representatives replied that it was difficult dealing with Sonny Kim but that they wanted to come back with an offer for the Union.

The parties then caucused among themselves on the phone. Caffey informed LaRuffa that he had been called by the union president and told to go immediately to one of the union shops to handle a problem. Caffey told LaRuffa to restart the conference call without him, and he would try to return to the call, if possible.

Thus, when the conference call resumed, it included only LaRuffa, Mieluchowski and Coleman. Coleman began the discussion by stating that Respondent had an offer to convey to the Union but that he and Mieluchowski had not discussed it with Kim and still had not received Kim's OK, but if the Union agreed to it, they would go back to Kim to get his approval and that they felt that with their strong support and urgence, Kim would agree to the proposal. The

proposal was for a contract that would last until December 31, a contract for essentially four months. Coleman proposed a raise of fifty cents an hour immediately for employees but added the requirement that the Union would agree to prevent any third party from engaging in boycotting or picketing against the store. Further, Coleman stated that the Union had a deadline of 11:59 p.m. on Monday, August 26 to accept the offer. LaRuffa replied that he did not think that the offer would fly too well with Caffey but he would present it to the Union. LaRuffa asked Coleman to send the offer to him in writing, so he could present it to Caffey.

An email exchange between LaRuffa and Mieluchowski began on Friday, August 23 at 1:54 p.m. and ended on Tuesday, August 27 at 9:03 a.m. The exchange is set forth below:

From: Eric LaRuffa [mailto:eric.rmglaw@verizon.net]
Sent: Friday, August 23 1 2013 1:54 PM Joe Mieluchowski
Cc: Jack Caffey
Subject: Re: Update Conference Call Number

Joe,
Subject to the Union's review of the Company's "tentative" proposal which you will be sending, the Union is suggesting to meet either in-person or via conference call on either 8/28/13, 8/30/13 or 9/6/13. Please advise asap.

From: Joe Mieluchowski
To: Eric LaRuffa
Cc: Jack Caffey; francistcoleman@gmail.com
Sent: Saturday, August 24, 2013 8:34 AM
Subject: RE: Company Proposal & Future Meetings

Eric,

First, Tom will be away on vacation beginning Tuesday 8/27/13 and will not be returning until mid-September.

Second, as we indicated, our contingent proposal is only on the table until 11:59 PM Monday 8/26/13. It is unfortunate that Jack got called away from negotiations prior to its conclusion yesterday and discussion regarding this proposal did not include him. Based on your email regarding scheduling additional meetings I send you the proposal that we discussed yesterday, in writing, it appears that the union has already rejected it. If this is the case, there is no need for me to send a written version. Please advise me at your most earliest opportunity as to if this is the case or not. If it is the case, all of our other positions from prior negotiating sessions up to this point remain unchanged. Unless the union is willing to agree to our last offer, there appears little point in further meetings.

Again, let me know at your very earliest opportunity if you still want me to send our written contingent proposal for your consideration, since the dates that you suggest indicate that the union won't accept our conditional proposal within the time frame that we proposed.

Joe Mieluchowski
President/ Owner
National Labor Relations Consulting

www.nlrc.info
0: 484-770-8384
C: 215-287-1740
Email: jm@nlrc.info

From: Eric LaRuffa [mailto:eric.rmglaw@verizon.net]
Sent: Tuesday, August 27, 2013 8:32 AM
To: Joe Mieluchowski
Subject: Re: Company Proposal & Future Meetings

Yes,
Send your proposal.

From: Eric LaRuffa [mailto:eric.rmglaw@verizon.net]
Sent: Tuesday, August 27, 2013 9:20 AM
To: Joe Mieluchowski
Cc: RMGLAW; Jack Caffey
Subject: Re: Company Proposal & Future Meetings

I believe that it was incumbent upon the Employer to provide the document in writing as it advised it would. I expressly advised that I did not have the authority to accept or decline the offer. Further, I requested that you provide the offer, as *you* said you would, in writing so that the Union could review it.

-- Original Message ---
From: Joe Mieluchowski
To: Eric LaRuffa
Cc: francistcoleman@gmail.com
Sent: Tuesday, August 27, 2013 9:03 AM
Subject: RE: Company Proposal & Future Meetings

Eric,

As we discussed, our proposal was on the table up through & until 11:59 PM of Monday 8/26/13. I regret that our offer was not addressed by the union prior to that.

Joe Mieluchowski
President/Owner
National Labor Relations Consulting
www.nlrc.info
0: 484-770-8384
C: 215-287-1740
Email: jm@nlrc.info

From: "Joe Mieluchowski" <JM@nlrc.info>
To: "Eric LaRuffa" <eric.rmglaw@verizon.net>
Cc: <francistcoleman@gmail.com>

Sent: Tuesday, August 27, 2013 10:35 AM
Subject: RE: Company Proposal & Future Meetings

After Tom & I discussed the offer during our last negotiating session with only you due to Jack being called away from the negotiations and prior to us having the opportunity to draft and send you the proposal that was discussed, the union forwarded future negotiating dates, clearly signaling to Tom & I that our offer was not being considered therefore, it was not drafted. On August 24th I requested confirmation of our suspicion, the 26th came and went and the union was not heard from again until today, 27th regarding this matter.

After receipt of Mieluchowski's last email on August 27, neither the Union nor Respondent requested any additional negotiation meetings. The Union filed its charge with the Region on August 28, alleging that Respondent engaged in surface bargaining and has refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.[11]

VI. The Union's Picketing

Shortly after the Union filed its charge, sometime in late August or early September, it began to picket in front of Respondent's store by setting up an inflated rat with a sign stating the name of the Union. Two union representatives, Eddie Diaz and Marcus Lopez, were present at the store, Monday through Friday, which lasted through mid-December. On occasion, some other union representatives would also be present. There is no evidence that any NYCC or other community group participated in or was involved with this picketing during this period.

During the month of September, Steve approached Diaz and Lopez while they were picketing. Steve informed the union representatives that Sonny wasn't going to sign a contract with the Union and that they were wasting their time. Steve repeated these comments to the union representatives on several occasions in early September.

In mid-September, Steve approached that union representatives again and began a number of similar discussions with them over the next several weeks. Steve informed the union representatives that there were only ten days left for your union, your contract is up. Steve

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[11] My findings above concerning the negotiations, including the August 23 conference call are based on a compilation of the credited portions of the testimony of the participants as well as my examination of bargaining notes, proposals and Respondent's position statement. There is very little dispute in testimony about any of the above findings. There is some dispute in testimony about the terms of Respondent's offer conveyed in the August 23 conference call from Coleman to LaRuffa.

I have credited LaRuffa's version of the conversation. I note that Mieluchowski testified, and he was asked if there were any conditions attached to Respondent's offer, other than the deadline. He responded, "Not that I recall." Thus, he did not specifically deny LaRuffa's testimony, which I have credited, that Coleman also stated that the Union would be required to agree to prevent any third party from engaging in boycotting or picketing against the store.

More significantly, while Coleman did take the stand to testify concerning another issue (denying that he had agreed that "Steve" was a manager at negotiations), Coleman did not testify about the conference call.

Thus, Coleman did not refute or deny LaRuffa's credited testimony that Coleman conditioned acceptance of Respondent's offer or the Union's agreeing to prevent third parties from engaging in boycotts of picketing.

added that he is not the boss and he is not going to sign the contract.

A few days later, Steve walked by the union representatives again and said that you guys only have five days left. A day or two later, Steve approached the union representatives again. On this occasion, Steve flicked up his hand and said, "You get three more days left for your contact year to be over." Finally, in the last discussion, Steve told the union representatives that the Union' s "out of here in another day or two," and added that the Union should get somebody to replace employee Martin because Respondent was "going to let Martin go once the Union is out of here." Martin is employee Martin Gonzalez, who was one of the leading union supporters as well as once of the witnesses for General Counsel in this case, whose testimony will be detailed below. Gonzalez credibly testified that he was present and overheard Steve commenting outside the store, sometime in August, while the protest was happening in front of the store, that as soon as the protest was happening in from of the store was over, every member "is going to go home."[12]

VII. The Withdraws of Recognition

On October 11, the Union received a letter from Coleman, advising that Respondent is withdrawing recognition from the Union "based on objective evidence that the great majority of Golden Farm's employees have clearly signified that they no longer wish to be represented by Local 338, RWDSU/UFCS." This resulted in another charge filed by the Union in Case No. 29-CA-114873 on October 16, alleging that Respondent unlawfully withdrew recognition from the Union.

On November 21, 2013, Coleman sent another letter to the Union, once again withdrawing recognition from the Union. The letter indicates that this letter is a follow-up to Coleman's previous October 11 letter and states that the Region regards that petition, which served as a basis for Golden Farm's earlier withdrawal of recognition as an insufficient basis for withdrawal. It goes to say that while Respondent does not agree with the Region's position, Kim, Respondent's owner, "received new petitions signed by 26 of its 32 bargaining unit employees." These petitions stated unequivocally that each and every signer no longer wished to be represented by Local 338 and on the basis of these new petitions, Respondent renews its withdrawal of recognition of the Union as representative of its employees, covered by the Board's certification. The Union then filed another charge in Case No. 29-CA-118832, alleging that this withdrawal of recognition was also violative of Section 8(a)(5) of the Act.

Respondent presented a number of witnesses and documents in connection with the petitions submitted to it, supporting its decisions to withdraw recognition, as detailed above, in its October and November letters.

Bong Ki Hong (Bong) and Jimmy Hong (Jimmy) (father and son) were both employees of Respondent. Bong Hong began working for Respondent in approximately February of 2013. Bong had previously owned and operated businesses in Mexico and China. His company in Mexico had a union representing its employees, and he characterized his experience with unions in Mexico as unpleasant.

[12] The above findings concerning Steve's comments in August and September is based on the credited testimony of Diaz and Gonzalez. While Steve testified and denied that he ever threatened any employees with terminations because of their support for the Union, he did not deny making any of the statements attributed to him by Diaz and Gonzalez, as I have detailed above.

According to Jimmy, Bong had informed him that because of the union, Bong had to close his factory in Mexico.

Bong returned to the United States in 2009 and began working for the Korean-American Small Business Service Center doing office work. Sonny Kim was and is a member of this association, and Bong met him at that time. At some later point, Bong asked Kim if he could give a job to his son, Jimmy, who was in college. Respondent hired Jimmy in late 2012, after the union election and certification.

Thus, Jimmy was an employee of Respondent before his father became employed by Respondent as a part-time employee in February of 2013.

Both Jimmy and Bong testified that Jimmy spoke to Bong at some point about his dissatisfaction with the "union" at the time of the demonstrations by NYCC, where the demonstrators were banging drums, paying with pennies and messing up the store. According to Jimmy, he believed that the Union was involved in the boycotts and protests because he saw some of the protestors were wearing union buttons and because some of the cashiers told him that they believed that the protestors had been hired by or were working with the Union. According to Jimmy, this boycott and demonstrations were making more work for him and he was unhappy about it. He testified that he spoke to some other employees during that period of time, who informed him that they were unhappy about the Union because of the boycott and that as the Union was progressing, Respondent was losing money because of the boycott and employees as a result were losing hours.

Jimmy testified that he spoke to his father at that time about the boycott and the conduct of the protestors and complained to him about it, and his father informed him that they were not suppose to be in the store. However, according to Jimmy, he did not discuss with Bong getting rid of the Union until September of 2013 when the picketing resumed.

According to Bong, Jimmy mentioned to him at the time of the boycott by NYCC that Jimmy did not know whether it was a union boycott or a strike and that they were there every day.

Both Jimmy and Bong agreed that they did not discuss getting rid of the Union or the petitions until late September of 2013. According to Jimmy, the picketing and boycotts started again at the time and he decided that he wanted to do something about the Union. He asserts that he spoke to his father and said the Union was back, they were pissing me off, they're making more work for me, that he had enough of the Union and what can we do about getting rid of them. Jimmy further stated that Bong replied that he (Bong) is not a fan of unions in the first place and he would look into determining what can be done to do something about the Union.

Bong concurred with Jimmy that the first time that he and Jimmy spoke about getting rid of the Union was in September of 2013, but his testimony about what was said differs from Jimmy's. According to Bong, Jimmy asked him why "such a small store a union is needed, especially in light of the fact that we were paying these workers hourly wages." Bong added that Jimmy asked if there is some way that this union activity and boycott in such a small store could be stopped. Bong further testified that he replied that he did not know that answer and he would look into the matter.

Bong testified further that he researched on various websites, including the National

Labor Relations Board and finally found a website for the Right to Work organization. This website provided information as well as sample language for a petition, which he printed out and used in preparation for the petitions, which were eventually circulated by Jimmy as well as other employees of Respondent.

Both Jimmy and Bong concurred that Bong prepared that petition and the language and gave it to Jimmy to circulate amongst Respondent's employees.

According to Jimmy, Bong gave him the petitions and informed him that to get signatures from a majority of employees, then they can get rid of the Union.

Bong testified that when he gave the petition to Jimmy, he told Jimmy that it was written in three different languages (Spanish, Korean and English) and instructed Jimmy to show it to each employee in whatever their first language is and ask them to read it. He also claims that he told Jimmy not to press anyone to sign it, it should be completely voluntary and that they should not tell the owner or the manager that they were circulating the petition because that would be contrary to the rules. Bong further asserts that he added that "we may not obtain 50 percent of the signature, and it may fall through and it may become a moot point, and there was no need to aggravate and irritate the bosses, the managers." Bong further testified that he had looked into it and found that it was lawful and possible (to get rid of the Union), "so let's try this." Bong added, "My son is the type, who, you know, he goes along with his father's wishes, and, you know, I told him, you know, we should try this, and he went. He didn't, you know, speak against it. You know, under our culture, he respects me."

Jimmy testified that upon receiving the document from his father in late September, he began to distribute the petition to employees in the store and that he enlisted employee, Jose Cuautle, to speak to the Spanish-speaking employees and to cashiers, Angelina Garcia and Sherry, to distribute it to the other cashiers. They all agreed to do so and, according to Jimmy, these employees were also in favor or getting rid of the Union. According to Jimmy, Angelina and the cashiers blamed the Union for the demonstrations and for the reduction in hours.

Jimmy further testified that he had conversations when he first started working with employees about the Union, and primarily the produce employees, such as Victor, Jose and Martin, were in favor of the Union but that most of the other employees, including the cashiers, were not happy with the Union because of the boycott and did not want the Union.

Thus, in late September, Jimmy testified that he distributed the petitions as well as the explanatory language contained therein to the English-speaking employees and Korean-speaking employees. He also testified that he gave the Spanish translation, plus blank petitions, to Garcia and Cuautle to distribute to the cashiers and other Spanish-speaking employees.

According to Jimmy, he distributed the petition to English-speaking employees, Egminiriz Tim and Lena Hong on September 22 and signed the petition himself on that date, He also testified that he showed the explanatory language accompanying the petition and its purpose and the actual petition, signed by the employees as well as Jimmy himself, contained the following language at the top: "Hereby request that our employees immediately withdraw recognition from the Union, as it does not enjoy the support of a majority of employees in the bargaining unit." Jimmy testified that he gave the documents to Hong and Tim and told them to read it and if they didn't want the Union to represent us, they could sign it. They both read the documents and petition and signed the petition on that date.

Jimmy further testified that he obtained the signature of employee Francisco, also on September 28, with the assistance of Angelina, who translated for him to Francisco in Spanish what the petition was. Initially, Jimmy asserts that Francisco was reluctant to take the paper or to sign but after Garcia spoke to him in Spanish, he signed it. Jimmy could not understand what Garcia said to Francisco.

Jimmy also testified that he obtained signatures from employee Mike (Mannonov) and his father Bong on September 30 and from employees, Tony Diaz and David Choudhly, on October 1. These petitions also contained the language cited above, that the signatures request that the employees immediately withdraw recognition from the Union as it does not enjoy the support of a majority of employees in the bargaining unit.

Jimmy testified that he told these employees to read the language and they did and explained that it was about the Union and if they want to sign it and "we have enough people, we can get rid of them." They read it, said fine and signed the document.

Jimmy testified that he solicited the signatures of Korean-speaking employees, Myong Lii Park, Boo Young Lee and Hyung Zuk Oh, on September 28. He asserts that he told these employees that if they want to get rid of the Union, they should read and sign the petition. According to Jimmy, they read the petition and the accompanying explanation in Korean and/or English and signed the petition, which contained the same language, detailed above, at the top, referring to the request of the employer to withdraw recognition from the Union "as it does not enjoy the support of employees in the bargaining unit."

Garcia and Cuautle corroborated Jimmy's testimony that he gave them the petitions and accompanying explanations in late September and explained it was to "get rid of the Union," and for them to read it and circulate it to other Spanish-speaking employees. Sherry, another cashier, was present when Jimmy spoke to Garcia and both of them were enthusiastic about handing out the petition to get rid of the Union. Cuautle read the paper and said OK and took the documents from Jimmy.

Garcia testified that she obtained the signatures of employees that she identified as cashiers. She specifically named Maria, Margarita and Estella as cashiers, whom she solicited, and also testified that she obtained signatures from all of the cashiers. The document that she identified as having been signed by the employees contained five names and signatures, including her own. The names and signatures of Shemane Zakir Zakim, Margarita Gomez and Maria Gomez contained dates of September 28. Garcia's signature was dated September 29, and that of Estella Flores was dated September 30. Garcia did not corroborate Jimmy's testimony that she assisted him in helping translate and obtaining the signature of Francisco. I note that the last name on the signature of Francisco is not possible to read. However, the *Excelsior* list in the representation case lists an employee, Francisco Gomez, as a stock person. Garcia also, at another point in her testimony, stated that she solicited signatures only from the cashiers.

According to Garcia, she told these cashiers to read the petition and the language on it and the accompanying documents and sign it if they wish and that she added, if they do not want to sign, no problem. They all read it and signed the petitions without any questions or discussion. Garcia denied that she promised any benefits if they signed the petition or promised them any additional hours or additionally money if they signed the petition.[13]

[13] Employee Roberto Ramirez Martinez testified that he overheard Garcia speaking to

Continued

Garcia testified further that she gave the petition that she got signed to Jimmy.

Cuautle testified, also corroborating Jimmy's testimony, that he obtained the signatures of several Spanish-speaking employees in late September and one on October 1.

According to Cuautle, he showed these employees the petition along with several other pages of explanatory language in Spanish.[14] Cuautle testified that he obtained the signatures of employees Marcus, Hugo, Joshua, Javier, Alejandro, Jose Perez and Rolando. The pages that he identified as having been obtained by him in September and October consisted of three pages. The first page contained the Spanish translation of the petition of the explanatory language reading "the undersigned employees of Golden Farm do not want to be represented by" and the name of the Union was left blank on this document. However, the explanatory pages, which, as noted, were according to Cuautle, given to the employees did contain the Spanish translation of this language with the Local 338 filled in after the phrase "do not want to be represented by."

The first page of the document, which, as noted, contained the language without Local 338 filled in, and a blank space in that section, contained two signatures, the first one, Cuautle's signature and the second one, Marcos Gomez). Both of these signatures had dates of August 28 listed next to their names. Cuautle testified that the dates were a mistake and the actual dates were September 28 and not August 28 as reflected on the petition.

The second page identified by Cuautle contained one name that of Alejandro with no last name, dated October 1, 2013. This page contained no other language on it but, as noted, Cuautle testified that he did show the employees, whose signatures he solicited, the Spanish translations of the explanatory language referred to above.

The third page of the document identified by Cuautle contained the signatures of four employees. This document also did not contain any explanatory language on it but contained only the four employees' signatures and dates.

The first two names on this document were Jose Perez and Rolando with a last name crossed out, both signatures dated August 28. Accordingly to Cuautle, both of these signatures were also dated improperly and were signed on the same date that he and Marcos signed the petition on September 28. This document also contained the signatures of Hugo and Joshua and another name, which has a first name that appears to read "Javier."

The record does reflect that the *Excelsior* list contained the name of an employee, Javier Rios Sevilla, living on E. 9th Street in Brooklyn. Further, General Counsel called as a witness Jesus Consuelo Rios Sevilla, who was also employed by Respondent, as a witness and whose name appeared in the *Excelsior* list with the same E. 9th Street address as Javier Rios. Rios

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cashiers about the petition and that she told the employees that the boss will find out who's with him and who's not, and if they signed, they would get more money and more hours. Martinez testified that he couldn't recall the exact date of this conversation that he overheard, but it was about a month ago. He testified on January 30, 2014. Martinez did testify as to who or how many employees Garcia was speaking to when he overheard these comments.

[14] These pages are the translation of the English version of the explanatory language, testified to by Jimmy and Bong, detailed above, that Bong testified that he obtained from the Right to Work website.

Sevilla testified that Javier Rios was his brother and that Javier informed him that he (Javier) had signed the petition to decertify the Union because he (Javier) was afraid of getting fired.[15]

Cuautle testified that he made no promises or threats to any of the employees from whom he solicited signatures. According to Cuautle, he gave the petition, plus the explanatory pages to each employee and asked them to read the pages and the petition and sign if they wanted to. Cuautle testified that he also said and understood the petition and the documents given to him by Jimmy, and understood that he was signing the petition because he didn't want the Union. Cuautle states that he asked the employees to read the petition and the accompanying documents, that it was about the Union and that they could sign or not.

He also testified that he gave the petition and the signatures that he obtained to Jimmy.

Jimmy and Bong are in agreement that after Jimmy obtained the signatures that Jimmy gave the petition, plus the explanatory documents back to Bong.

Subsequently, these documents were transmitted to Respondent's attorney, which led to Respondent's first withdrawal of recognition, as detailed above.

However, the testimony of Bong and Kim is inconsistent and muddled concerning how these documents, plus an additional list of employees, came to be submitted to Respondent's attorney. Kim testified first, initially asserting in his direct testimony that he first received these petitions from Bong by email and that subsequently Bong gave him the original petitions.

On cross-examination, however, Kim testified that he spoke to Bong in late September, before receiving the petition, during which Bong informed Kim that Bong's son Jimmy had come to him and wanted to find out how to get rid of the Union. Bong further informed Kim, according to Kim, that he (Bong) was going to look it up on the internet about how to decertify the Union and that he was going to get three separate petitions, one in English, one in Korean and one in Spanish. Kim asserts that Bong said that he knows lots of things about unions[16] and added that it was up to Bong and Jimmy to do it or not.

Kim further testified that he became aware that the petition was being circulated by Jimmy, Angelina and Jose. Kim claims that sometime in early October, Bong came to him with the original petitions that Jimmy and the other employees had obtained and informed him that he had obtained signatures from 26 employees and that he wanted to send it to Respondent's lawyer. Kim further testified that he gave Bong his lawyer's email address, and two days later, Bong spoke to him again and informed Kim that he had emailed copies of the petition to Respondent's lawyer (Francis Coleman) and gave Kim the original petitions and instructed Kim to put them in his safe and make sure not to lose it.

Kim further testified that after he received the original petitions, he prepared a list of Respondent's employees using the *Excelsior* list and Respondent's wage statements, and in some cases, asked employees for their last names.[17]

Kim testified that based on this effort, he prepared a document, entitled, "Golden Farm

[15] Javier did not testify.

[16] Kim testified that he knew that Bong had experience dealing with unions in Mexico.

[17] The wage statements that Kim referred to that he consulted did not include employees' last names.

Employees," which reflected the number of employees at the time and compared signatures of the employees, which were included on the wage statements.

This document, according to Kim, reflected the names of the employees, and which employees signed the petitions and which did not sign the document, is set forth below:

GOLDEN FARM EMPLOYEES

1	JOSE CUAUTLE	X
2	MARTINE SILVA	
3	ROBERTO MARTINEZ	
4	FRANSISCO GOMEZ	
5	GONALO PARALTA	
6	VICTOR SILVA	
7	JAVICER RIOS	X
8	JESUS DELCONSUELO	
9	MARIA YOMEZ	
10	MARGARITA GOMEZ	
11	ANGELINA GARCIA	
12	SHAMANE ZAKIR	
13	MOUNG UI PARK	
14	JOON CHUL LEE	X
15	BOO YOUNG LEE	
16	BONG KI HONG	
17	MIKE MANNONOV	
18	TONY DIAZ	
19	LENA HONG	
20	DAOUD CHOUDHIG	
21	EGMNIZRZ TIM	
22	JIMMY HONG	
23	ESTELA FLORES	
24	YOUNG OH	
25	ROLANDO YOMEZ	
26	JOSE PEREZ	
27	HYUNG OH	
28	HUGO TOSHUA	
29	MARCOS GOMEZ	
30	RODOLFO PRIEGO	
31	ALEJANDRO YOMEZ	
32	NOH SOON PARK	

As noted, this document does contain a list of employees with an "X" marked next to three names but Kim furnished no testimony as to what these three "Xs" meant. He did testify, however, that based upon this list and the signature comparison that he made, as detailed

above, he determined that a majority of Respondent's employees had signed the petition.[18] He further asserted that he emailed the petition and the list of employees to his attorney, and after a discussion with the attorney, in which the attorney told him that he had received the email from Bong, the attorney (Coleman) told Kim that he would send it to the NLRB and withdraw recognition from the Union.

Kim also testified that when he compared the signatures on the petition with those of Respondent's employees, Bong had already sent copies of the petition to his attorney. Kim further testified that Coleman had asked for a list of employees and that he subsequently forwarded the list to Coleman that he prepared.

During the investigation, Respondent's attorney, Coleman, sent in a position statement to the Region, reflecting Respondent's position and arguments and attached various supporting documents. These documents included copies of the petitions signed by the employees, which also included circled numbers next to each signature. The numbers corresponded to the numbers that appeared on the document. For example, the first signature on the list of employees was Cuautle. Thus, next to Cuautle's signatures on the petition was a circled "1." On the list at number "31" is Alejandro Yomez. The petition, as related above, contains the name Alejandro with no last name, dated October 1, 2013. Number "25" on the list is Rolando Yomez. The petition lists Rolando with no last name and was dated August 28, 2013.

Further, number "7" on the list is Javier Rios, while the petition contains only the first name, which appears to read Javier.

When asked on cross-examination about these numbers, Kim testified that he wrote the numbers on the petition and sent it to Coleman in early October, and as a result of the comparison of the list and the signatures, as noted above, the withdrawal of recognition was sent by Coleman to the Union.

Bong testified subsequent to Kim, and his testimony was significantly different from Kim in several respects concerning several of the above matters. According to Bong, after he obtained the signed petitions from Jimmy, he brought them to Kim and informed Kim that he had obtained signatures from employees. According to Bong, Kim asked what it was about, and Bong explained that this "is a legal way for us to stop the union boycott, I found out, and I got the signatures. And that the necessary number of employees signed off on this petition." Bong then asserts that he added that it may be advisable to send it over to an attorney so he could review it before sending it to anyone else. Bong further states that he added that more than 20 people had signed the petition and that he (Kim) looked at the petition and flipped through the pages at that time. Kim then, according to Bong, gave Bong Respondent's attorney's email address. Bong denied that he had spoken to Kim about the petition prior to it being circulated, contrary to Kim's own testimony, as related above, and asserts that the only conversations that he had with Kim about the Union were when Kim allegedly informed him that "I got hurt" in a discussion about the Union at some prior time. Bong also testified that he had told Kim about his own experience with unions in Mexico.

Bong, at first, testified that he then emailed copies of the signed petitions to Coleman. At that point, when General Counsel requested copies of the email to Coleman, Coleman stated that he never received any email from Bong. Bong then changed his testimony and stated that the email address that he was given was actually to "Joe" and that is where he sent the email.

[18] Kim also testified that there were signatures from 26 employees on the petition.

When asked by General Counsel whether the email that he sent contained numbers next to the signatures, he then stated that he sent two emails to "Joe," the second of which contained the numbers next to the signatures. According to Bong, it was he (and not Kim), who wrote the numbers next to the signatures.

The email that Bong eventually sent was finally retrieved by Bong and produced after the hearing closed and was introduced into the record. This revealed one email, and not two, from Bong was sent to "Joe" on October 3, 2013 at 11:41 am.[19] The email reads, "Dear Sir, If you need more detail information let me know." The email contained attachments, which included a list of Golden Farm employees from 1-32, which is similar to the list identified by Kim that he identified and allegedly utilized to compute the number of employees, who signed. The attachments also included the explanatory language that accompanied the petitions as well as copies of the petitions with the number circled next to their names from the attached list. Again, Bong insisted that he had written in the numbers next to the signatures on the petitions. Bong did not testify where and when he had obtained the list of Respondent's employees that he submitted to "Joe," nor how he was able to determine which names corresponded to which signers. For example, as noted above, the signatures appearing on the petition had no signature of Rolando and "Javier" or "Javicer" had no last names included. He did not indicate how he concluded that number "2" was the signature of Javicer Rios and number "25" of Rolando Yomez.

Kim testified that after the first petition was sent and the first withdrawal of recognition forwarded to the Union that he was informed by Coleman that the petition had to be redone. According to Kim, Coleman told him that the petition submitted was "insufficient" because each signature needed to have a heading on the same page that contained the signatures, explaining what the petition was meant to convey.

According to Kim, he then spoke to Bong and explained what his attorney, Coleman, had explained to him was wrong with the first petition and a new petition had to be circulated and that there needed to be headings on each page of signatures in Spanish, English and Korean. Kim states that Bong told him that he would try to go back and make new forms on the computer and try to put a heading on each signature page.

Bong's testimony is slightly different but similar to Kim on this issue. Bong testified that Kim told him that at the end of October that Respondent's attorney had informed Kim that the petition was insufficient and needed to be redone and that the signatures needed to be obtained all over again in "a proper form." According to Bong, Kim told him that the signatures were signed erratically, meaning that some pages had only two signatures and others' four, and it had to be redone more neatly and simpler.

According to Bong, he redrafted the petitions and with explanatory language on each page in three languages and gave the documents to Jimmy to recirculate to the same employees, who signed the first petition. The second batch of petitions, as testified to by Bong and confirmed by Jimmy, consisted of documents in three languages, entitled, "Petition to Remove Union as Representative." Each page then included the language that "the undersigned employees of Golden Farm do not want to be represented by Local 338 hereinafter referred to as the Union." It also contained language that if the undersigned consisted of more than 50% or more of the unit employees, the employees request that the employer withdraw

[19] Joe is Joe Mieluchowski.

recognition from the Union as it does not enjoy the support of the majority of the employees in the bargaining unit.

Jimmy testified that he then distributed and obtained signatures from the same employees that signed the first petition with the assistance of Garcia and Cuautle.

They obtained the signatures and, which were turned over to Jimmy, who gave the petitions to Bong. Bong then submitted the new signed petitions to Kim. The new petitions consisted of six pages with each page containing the heading, as described above, in the language of the signers. Thus, one page included a Korean translation with five signatures, three dated October 13, one dated November 9 and another November 17. Two pages had an English translation of the language and included five signatures dated October 30, three dated October 31 and one dated November 2. Finally, three pages include a Spanish translation, contained twelve signatures, dated from October 30 to November 4.

After Bong gave the new petitions to Kim, he told him that he had obtained new signatures and gave them to Kim. Bong also testified that he asked Kim to give him back the originals of the first petition that Bong had given to Kim to keep, so that Bong could compare it to the second set of petitions. Bong asserted that he did so and confirmed the fact that the same signatures were on each and returned the originals to Kim.

Kim did not testify about the latter event, but merely stated that Bong returned the second set of petitions to him and that he (Kim) reviewed the second set and determined that the signatures were the same. Kim testified further that he reviewed the new petitions and again compared the signatures with a list of its employees, ones employed at the time of the second petition. Kim testified that this list contained 31 employees and while the prior list contained 32 names since one employee was in the hospital between the dates of the two petitions. Kim prepared a second list of employees entitled, “Golden Farm employees,” which contained 31 names, and Coleman marked a column “signed,” which contained an “X” for 26 employees and column marked “not signed,” which contained an “X” for five employees.

Kim testified further that he then sent a copy of the new petitions, plus the above-detailed list of employees to Coleman, who in turn, sent a second withdrawal of recognition letter to the Union in November, as detailed above.

The record also reflects that the list of employees submitted by Kim and prepared by Respondent did not contain the name of Young Chung Chun (Steve). According to Kim, Steve was out of work at the time of the signing of the first petition, so he was not asked to sign it. Therefore, Steve was not asked to sign the second petition although he was back at work by that time since he had not signed the first one. Jimmy confirmed that Steve wasn’t there when the first petition was signed, so he didn’t ask Steve to sign the second petition since he only asked the same people, who signed the first petition to sign the second petition.

I note though that when Steve testified, he testified the he was out sick for three days in December but not in September and October when the petitions were circulated. Steve added that when the first petition circulated, he understood from some employees that Jimmy was looking for him to sign but that he (Steve) was never asked to sign either petition.

The record reflects that two signatures on the petitions, described above, were Joon Chal Lee and Noh Soon Park. These names did not appear in the wage statements, provided to General Counsel in response to its subpoena in this proceeding. Kim testified that both of these individuals were employed by Respondent at the time that both petitions were signed, and in

fact, were still employed as of the date of the trial. According to Kim, Lee is a buyer and Park was and is a nighttime cashier. Kim testified that these employees do not punch timecards but do sign in, but Respondent did not produce any sign-in sheets or wage sheets for these individuals. Kim testifies that this wife, Sharon, prepared the documents to be sent to the Region to respond to the subpoenas, implicitly arguing that she simply overlooked submitting wage statements or sign-in sheets for these employees. However, Sharon was not called as a witness nor were any wage statements or sign-in sheets submitted that included these employees.

I note that neither of these two names appeared on the *Excelsior* list, which was prepared at the time of the election in the fall of 2012.

Jimmy testified that he solicited the signatures of both Lee and Park and testified that these individuals worked for Respondent at night and that he obtained their signatures in the evening on October 1, 2013. Park and Lee also signed the second petition on October 30, 2013.

Finally, it is also notable that the certification specifically excludes buyers from the bargaining unit along with managers, office clerical employees, guards and supervisors as defined by Section 2(11) of the Act. As related above, Kim testified that Lee was employed as a buyer.

Respondent produced a document pursuant to a subpoena entitled, Golden Farm Staffs Schedule. It lists names of 33 employees, plus schedules and has a heading of department. This document lists a "Mr. Park," as a night cashier, working from 8pm to 8am (Thu.), 8pm-2am and off days on Tue. and Wed. It also lists "Joon Chul," as a buyer, working 3am to 11am with off days on Sat. and Sun.

The *Excelsior* list, which as noted, reflected employees as of September of 2012, listed an employee, Muong Park as a cashier but had no listing for a Hoo Soon Park.

VIII. Status and Conduct of Steve

Young Chung Chun (Steve Chun) has been employed by Respondent for approximately eight years. According to Steve, he is a stockman, that he has items that he handles, keeps track of inventory, places orders, takes deliveries and displays them. The *Excelsior* list listed him merely as a "stockperson," while the staff schedule listed Steve as "grocery buyer and security." That schedule also, as noted, listed Joon Chul as a buyer and also listed Jose, presumably Cuautle, as produce buyer, working from 8am to 8pm. No other employees have the listing of buyer.

A number of employees, who testified, including Garcia, who was a witness for Respondent, testified that they considered or believed Steve to be a manager.[20] These employees testified that they were told by other employees that Steve was a manager and that when a customer or an inspector asks to see a manager and Kim is not there, the employees refer that individual to Steve.

In December of 2013, Steve approached Silva while he was working peeling potatoes. They had an argument, Steve pushed Silva and pushed the box of potatoes to the floor. At that point, Kim came over and started yelling at Steve in Korean and Steve screamed back at Kim,

[20] Employees Victor Silva, Hugo Hernandez, Martin Gonzalez, Jesus Consuelo, Rio Sevilla and Roberto Ramirez Martinez.

also in Korean. After Kim and Steve finished their yelling at each other, Steve turned to Silva and said to Silva in Kim's presence, "Why are you still working here. The boss is not going to give you a contract. And, the Union is not going to come here. Why don't you go home?" Kim, who was present during these comments, did not say anything. Silva then turned to Kim and said, "What's going on with your manager?" Kim replied, "I don't know, maybe he is crazy." Silva did not go home, as Steve had ordered, and continued to work for Respondent after the above comments from Kim.

According to Silva, the above incident with him was a familiar and common result. Employees Benjamin and Alberto were also told by Steve that they were fired and that these employees subsequently went to Kim, and Kim also overruled Steve and told the employees that Steve was crazy.

Martin Gonzalez works for Respondent in the produce department. He testified that his direct supervisor is Jose Cuautle but that Steve is also a manager and that Steve writes orders, receives merchandise that arrives and has given work orders to Gonzalez, such as to go sweep the street, which Gonzalez complied with when told to do it by Steve.

About two years ago, Gonzalez was passing by Steve while at work and said excuse me. Steve then turned around, started to curse at Gonzalez and then said to Gonzalez, "If you don't want to work, you can go home." Gonzalez initially complied with Steve's instructions and went home. At that time, Gonzalez was a participant in the lawsuit against Respondent, described above. When he did go home, he telephoned the attorney in charge of the lawsuit, who informed him that he should return to work and that only if the owner fired him, he should go home.

The next day, Gonzalez returned to work. He spoke to Cuautle, who, as noted, Gonzalez considered to be his direct supervisor. Gonzalez asked Cuautle what did he think about yesterday and what Kim said about it. Cuautle responded that Kim said that he didn't care if Gonzalez came back to work or not. Gonzalez asked Cuautle what he thinks. Cuautle responded that Gonzalez should go ahead and work like nothing happened. Gonzalez did not speak to Kim about the incident and he continued to work for Respondent since that day.

Sometime in August of 2013, Gonzalez was outside the store with onions when he overheard Steve make a comment to other employees that "as soon as the problem stops, every worker is going to go home." According to Gonzalez, the problem that Steve was referring to was "the protest that was happening in front."[21]

Sometime in December of 2013, Gonzalez was having a work-related discussion with a co-employee, Bonafacio, when Steve observed their discussions and called Bonafacio over to talk to him. Later on, Gonzalez asked Bonafacio, "What did the manager say?" Bonafacio replied that Steve informed him not to talk to Gonzalez because Gonzalez was a bad person. Gonzalez was never asked to sign the decertification petition by any of the solicitors and, as related above, Jimmy testified that the produce employees, including Gonzalez, were known to be union supporters, which explains why he as well as the other produce employees were not asked to sign the decertification petition.

Jesus Consuelo Rios Sevilla testified that he works on the night shift in the dairy department and his direct supervisor and manager is Steve. Steve gives Rios Sevilla orders,

[21] As noted above, the Union began picketing in late August of 2013, utilizing a rat.

such as to clean the dairy and clean the shelf and that he complies because if he doesn't, he will get fired. Rios Sevilla was asked by a customer to speak to a manager because there were problems with a cashier. Rios Sevilla informed the customer that at 8:00, Steve, the manager, will be in and the customer could speak to him.

Sometime in December, Rios Sevilla was working in the freezer downstairs. Rios Sevilla was putting in a box of milk and Steve was checking that order of a box of milk that had arrived. Steve said to Sevilla that "when the Union leaves as well as Roberto, Victor and Martin, I will give you more hours and more money because you are the number one person, you are a good person."

Roberto Ramirez Martinez works for Respondent since 2005 in the vegetable area. His hours are 11am to 8pm. He testified that his direct supervisor is Cuautle and that Steve is the manager for the grocery department. Martinez testified that Steve receives all grocery products in the morning and in the afternoon and places orders for the next day for the products. Steve also signs for delivers that come in for products, such as rice and other products, and will pay the delivery employees with a check from Respondent or with cash. He testified that Steve gives orders to employees, such as when Martinez was on the phone, Steve told him to stop talking on the phone and get back to work. Martinez testified that he stopped talking because I know that he's my manager and I knew if I don't follow what he's saying, they're going to fire me automatically.

Martinez was not asked to sign the decertification petition that was circulated in the Fall of 2013. As I have detailed above, he did testify to overhearing a conversation between Garcia and some co-workers about the petition, which, as also noted above, Garcia denied.

About 15 days from the date of his testimony, which would make it in January of 2014, Martinez was speaking with a newly hired employee, whose name he did not know, and Steve called the employee to the back. After the employee returned from his conversation with Steve, the employee said to Martinez that he (Martinez) was a fathead. Martinez asked if the employee was calling him a "fathead," and the employee replied yes. Martinez asked why and the employee answered that Steve had said to him that "you, Victor and Martin are fatheads." Martinez asked what was going on and why was he telling Martinez all this. The employee replied, "Well, Steve told me that I couldn't talk to you, that you are bad people because you called the Union."

At around the same time, Martinez overheard Steve speaking to this same employee. Steve told this employee to help the boss with signatures for the Union to leave, and if the Union leaves, then "we will give you more hours of work." Steve also told the employee "not to talk to him (referring to Martinez) that he (Martinez) was a bad guy and that "we were shit and we needed to leave." Steve did not have a petition in his hand at that time. The employee did not respond to Steve and merely nodded his head.

About four years ago, Martinez was listening to music on the radio while he was working. According to Martinez, he had previously asked Kim if he could listen to music while working, and Kim agreed that he could do so.

However, Steve came over to him, took his radio and kicked it and destroyed it. Martinez asked Steve what's the problem, why are you going this. Steve replied that Martinez's area was messy, he didn't clean up. Martinez replied that he did not work yesterday, so he wasn't here. Steve responded that it doesn't matter.

Another employee came over and told Steve to calm down and corroborated that Martinez wasn't working that day. Steve replied that he didn't care and that both Martinez and the other employee should leave. According to Martinez, Steve "fired us." However, Martinez recalled that previously Kim had informed him that he (Kim) was the boss and only Kim can fire someone. Therefore, Martinez and the other employee didn't go home but spoke to Kim about the incident. Kim told them to go back to work and "to pay no mind to Steve, that he's crazy."[22]

The record also contains several notices of inspection documents, signed by an inspector from the New York State, Department of Agriculture and Markets dated on June 7, 2012, September 25, 2012 and October 3, 2013, respectively, which reflected that an inspector made an inspection of Respondent's store on these dates, and included the results of the inspections. Thus, two of the reports found no critical deficiencies and that the establishment was in substantial compliance, but the third report indicated critical deficiencies, which were detailed in the report. All of these documents were signed by Steve Chun on behalf of Respondent and reflected that his title was manager. In fact, Chun signed his name next to or under the designation of manager on each of these forms.

While Chun conceded that his signatures appeared on these documents, I do not credit his testimony that he told the inspector that he was not the manager and that Kim, the manager, is not there this week. He also asserted that after he saw that his signature was next to the title of manager, he told the inspector it was a mistake and also allegedly said "you seem to be a good worker, you might as well be a manager."

I find this testimony to be disingenuous and not believable, and I do not credit his testimony in this regard. I note that Steve admitted that he posted the notice at the store and that it was his job to post the notice after the inspector completed the report. Further, other testimony from employees in this record confirmed that when an inspector comes into the store, looking for the manager and Kim is not there, that the employees refer the inspector to Steve and that Steve accompanies the inspector while they conduct the inspections.

Therefore, I find that Steve signed the reports as manager of Respondent, and further that Steve held himself out as manager to the inspectors, employees and customers when customers asked to see a manager, as testified to by the employees.

The record also contains two documents entitled, discipline notice for employee, Cecilio Trinidam, on July 2 and 3 of 2012. The documents contained the employee's name, the date of the infractions and the details. One was a violation of the no call, no show policy and the other violation reflected that the employee was drunk on the job and contained specific details of this activity and how the employee looked on the day in question. These documents were signed by Steve Chun as well as by Jose Cuautle, designated as senior grocery man and senior produce man, respectively. Steven Chun testified that he wrote up the documents as the direction of

[22] My findings with respect to the above conversations between Steve and the employees and conversations that employees heard between Steve and other employees are based on the credited and mutually corroborative testimony of Silva, Rios and Martinez. I note that Steve did not deny making any of the specific comments attributed to him by the employees. Steve merely made generalized denials of the complaint allegations. Further, the testimony of all the witnesses, who were all current employees, is apt to be particularly reliable since it is testimony adverse to their personal interest. *Farris Fashions*, 312 NLRB 547, 554 fn. 3 (1993), enf. 32 F.3d 373 (8th Cir. 1994); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006).

Kim, who signed the documents, next to the title of manager. Kim confirmed that he instructed Chun to write up the notices and that Chun did so in addition to signing of the notices as a witness.

Edwin Diaz, as noted above, is a union representative, who was involved in the picketing on behalf of the Union with the rat at Respondent's store in late August. Diaz was also organizing for the Union in March of 2013 outside the store. He had come to the store because Gonzalez had informed him that Respondent had posted something on the wall that he should see. When Diaz arrived, Gonzalez was speaking to a young Russian employee. They were talking, and Diaz approached the employees and asked the Russian employee if he knows what's been going on the last year with the workers. The employee replied that he knew and felt it was unfair. At that point, Steven Chun walked out from the store, and when the employee saw Steve, he walked away from Diaz and Gonzalez. A few minutes later, Diaz approached the employee while he was unloading the van. Diaz asked what's happening. The employee replied that "we've been told that if we talk to you, we're going to get fired."

Later, on that same day, Diaz began to take pictures of the posters that Respondent had posted, which reflected that 75% of the workers didn't want the Union. Steve approached Diaz and asked what he was doing. Diaz answered that he was taking pictures and added that "this is a violation." Steve responded that Diaz was wasting his time taking these pictures because Sonny (Kim) had already lined up private workers at unemployment to replace the five guys that we had there. So, as soon as the Union was out, these guys, Sonny would replace them with the five guys lined up at unemployment. Gonzalez was two feet away from Steve and Diaz during this conversation.

IX. Analysis and Conclusions

A. The Motion to Strike Testimony of General Counsel's Witnesses

Respondent renews its motion in its brief to strike the testimony of General Counsel's witnesses, who testified with the assistance of a Spanish interpreter.

Several of General Counsel's witnesses testified in this proceeding using the same interpreter to translate their testimony from Spanish to English. During the testimony of these witnesses, Angelina Garcia, an employee of Respondent (and a potential witness of Respondent), was present and observed their testimony. Neither Garcia nor anyone else at the hearing made any objection at trial to any of the translations made by the interpreter or made any assertion that the translation was inaccurate or incorrect.

When Respondent called Garcia as a witness in its case, Garcia testified that the interpreter used to translate the testimony was an individual, who participated in the NYCC demonstrations and boycott in the Spring of 2012, and specifically recalled that this individual participated in the demonstration on behalf of NYCC and came inside the store and had an argument with Garcia at Garcia's register. According to Garcia, the individual came to her register with a lot of shopping. Garcia said that she was with the boycott and would not check her out. According to Garcia, the interpreter replied to her, "I do whatever I want to because this is the USA. If you want to go, go back to your country."

Garcia testified that she recognized that the interpreter and the individual, who participated in the demonstrations and had the argument with her, are the same person because she "was fat" and that she (Garcia) also saw this individual on a video on the internet downloaded by NYCC concerning Respondent.

The interpreter did not testify in this proceeding.

Respondent contends that Garcia's testimony establishes that the interpreter was a participant in the NYCC boycott and demonstrations against Respondent and that she cannot be construed as an unbiased interpreter and should not have been used to interpret the testimony of the witnesses in this proceeding. Therefore, Respondent contends that the testimony of all of the General Counsel's Spanish-speaking witnesses should be stricken.

General Counsel argues, initially, that I should discredit Garcia's testimony as to her identification of the interpreter as the same person, who participated in the demonstrations and boycott, because, according to General Counsel, Garcia's testimony that she knew that the interpreter was the same person at the demonstrations because "of how fat she was" was "incredible." I find nothing incredible about that testimony, particularly since there is no testimony or any evidence in the record, indicating whether the witness was or was not "fat."

Further, Garcia also testified that she observed the interpreter on a video on the internet by NYCC, which contained pictures of the demonstrations at Golden Farms, as a participant in these demonstrations. I find that testimony of Garcia credible although, initially, she testified that she saw the video at the store or on Facebook. More significantly, General Counsel never called the interpreter to testify on rebuttal to deny Garcia's testimony that she participated in the demonstrations on behalf of NYCC or made the comments to Garcia on that day, as Garcia recounted.

I, therefore, credit Garcia's testimony, as detailed above, that the interpreter, who translated the testimony of five of General Counsel's witnesses, was the same individual, who participated in the demonstrations and boycott on behalf of NYCC against Respondent in the Spring of 2013 and had an argument with Garcia during that day, wherein she told Garcia "to go back to her country."

Respondent argues in its brief (as it did at the hearing) that based on the above finding that the Spanish interpreter was anything but unbiased and objective and there was no way for Respondent to determine if the interpretations of the interpreter were accurate reflections of what the witnesses responded. It further asserts that the appearance of bias and prejudice alone is sufficient for rejecting the testimony of General Counsel's witnesses.

I do not agree. As I ruled at the trial, and as reflected in the record, there is no evidence that any of the translations by the interpreter were inaccurate or shaded in any way. To the contrary, Garcia, when she testified, was asked this question, admitted that she heard the testimony of the witnesses and the translations of the interpreter and conceded that she did not detect that any errors or mistakes were made.[23]

I, therefore, reaffirm my ruling at trial that there is no legitimate basis to strike the testimony of these witnesses, which was translated accurately and correctly.

I reject the contention of Respondent that "the appearance of bias and prejudice" is sufficient to reject the testimony of these witnesses. There is no evidence that the General

[23] Moreover, I also note that General Counsel asserted on the record that she is bilingual and heard the testimony of the witnesses and the interpretation, and that as an officer of the court, stated that the interpretations were accurate.

Counsel was aware, prior to the trial, that the interpreter utilized by the Region may have been a participant in the demonstrations on behalf of NYCC. Further, I also note that NYCC is not a party in this case, and there is no evidence that the interpreter had any connection to the Union.

Accordingly, the motion to strike the testimony of General Counsel's five witnesses is denied.

B. Status and Conduct of Steve Chun

Although the complaint alleges that "Steve" (Chun) is a 2(11) supervisor and an agent of Respondent, General Counsel appears to have abandoned the position that Chun is a 2(11) supervisor as it makes no such contention in its brief. That position is not surprising since the record is bereft of evidence that Chun had exercised or possessed the indicia set forth in Section 2(11) of the Act. Thus, I conclude that the record does not establish that Chun was a supervisor within the meaning of Section 2(11) of the Act, and I shall recommend dismissal of that portion of the complaint.

However, that still leaves the portion of the complaint that alleges that Chun was an agent of Respondent, which General Counsel has not abandoned and vigorously argues in its brief.

That still leaves the crucial issue for determination of whether Chun has been an agent of Respondent within the meaning of Section 2(13) of the Act.

In this regard, the Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority will result from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, "employees would reasonably believe that the alleged agent was acting on behalf of management when he took the action in question." *California Gas Transport*, 347 NLRB 1314, 1317 (2006); *Great American Products*, 312 NLRB 962, 963 (1993). As stated in Section 2(13) of the Act, when making the agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Here, while I have found that Chun did not exercise supervisory responsibilities sufficient to establish 2(11) supervisory status, his position and duties are relevant in determining agency status. It is well-settled that agency can be established when the employee is held out as conduit for transmitting information to the employees. *D&F Industries*, 339 NLRB 618, 619 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998).

Here, I conclude that Respondent placed Chun in a position, wherein employees would reasonably believe that he was "speaking and acting for management." The evidence establishes that Chun directed, assigned and corrected work of employees, told them that they were terminated or to go home, signed and wrote up disciplinary notices, signed inspection notices by government agencies as manager, which were posted in the store, dealt with customers, who asked to see managers and was perceived by employees to be a manager. Further, while Respondent by Kim overruled Chun's attempts to discharge employees, he did not disavow Chun's conduct to the employees and did not discipline Chun for his conduct in attempting to fire employees and did not tell employees that Chun was not their manager or supervisor. Kim's only comments to employees, when they complained to him about Chun and referred to Chun as "your manager," was that Kim said that Chun was "crazy" and not that he

(Chun) was not a manager or that they should not listen to what Chun tells them.

Therefore, I conclude that based on the evidence, detailed above, that the employees would reasonably believe that Chun was speaking for management and that he is and was an agent of Respondent at the time that he engaged in the conduct, described above and below. D&F Industries, 339 NLRB 618, 619-620 (2003) (assistants to packaging manager held to be agents although not supervisors of employer in view of their roles in assigning work to employees; Board concludes that in these matters, the assistants "spoke to employees as representatives of management and that employees perceived them as such"); *Bill's Electric*, 350 NLRB 292 fn. 3 (2007) (foreman found to be agent, who assigned and directed work of employees and was highest paid employee on jobsite); *United States Service Industries*, 319 NLRB 231, 237 fn. 4 (1995) (again, status found based on Board's findings that employer placed disputed individuals in positions, where employees believed that they spoke on behalf of management, where they assigned work, checked work of employees, issued written warnings and were identified as supervisors); *Three Sisters Sportswear*, 312 NLRB 853, 864-865 (1993) (section supervisors agents although not 2(11) supervisors, where they assigned and corrected work of employees and were designated by employer as supervisors); *Medical Center Convalescent Hospital*, 247 NLRB 586 fn. 3, 590 (1980) (alleged supervisor held herself out to other employees as agent of employer by signing documents and warning notices as supervisor); *Portsmouth Ambulance Service*, 323 NLRB 311, 314 (1997) (agent in charge, when manager not present, assigned work to employees and maintained keys to offices); *Great American Products*, 312 NLRB 962, 963 (1993) (agent assigned work to employees, warned employees that they could be terminated if they did not meet production goals and was introduced to employees as a supervisor).

Since I have found Chun to be an agent of Respondent, I now turn to various statements made by Chun to employees, alleged to be violative of the Act.

In late August, the Union began to picket outside the store, utilizing an inflated rat with two or three officials, including Eddie Diaz present. In late August and September, Chun spoke to Diaz in the presence of other employees and to employees directly outside the store. Chun informed Diaz that the Union will "be out in another day or two" and that the Union should get somebody to replace Martin (Gonzalez) because Respondent was "going to let Martin go, once the Union is out of here." Chun also informed an employee (overheard by Gonzalez) that as soon as the problem stops (referring to the Union's picketing), every worker is going to go home."

I find these comments of Chun to be unlawful threats of termination of employees because of their support for and activities on behalf of the Union.

Similarly, in December, Chun informed employees Rios Sevilla that when the Union leaves Robert (Martinez), Martin (Gonzalez) and Victor (Silva) will be terminated and that he (Rios Sevilla) will be given more hours. This comment also represents another threat that Respondent would discharge union activists because of their union activity in further violation of Section 8(a)(1) of the Act.

Similarly, also in December, Chun, in the presence of Kim, yelled at Silva and asked Silva "why are you still working here." Chun added that the boss is not going to give you a contract. I find these comments by Chun (which were, as noted, made in Kim's presence and

not disavowed by Kim),[24] constituted implied requests that employees quit because of their support for the Union and is an implied threat of discharge. *Heritage Nursing Homes*, 269 NLRB 230, 231 (1984); *Rolligon Corp.*, 254 NLRB 22 (1981); *Stoody Co.*, 312 NLRB 1175, 1181 (1993); *Steinerfilm*, 255 NLRB 769 (1981), enfd. in relev part 669 F.2d 845, 849 (1st Cir 1982); *Bell Burglar Alarms*, 245 NLRB 990 (1979); *Jobbers' Supply Inc.*, 236 NLRB 112, 118 (1978); *Sans Souci Restaurant*, 235 NLRB 604, 606 (1978); *Rabco Metal Products*, 221 NLRB 1230, 1233 (1975); *Padre Dodge*, 205 NLRB 252 (1973) (asking employee, a known union adherent, why if he was not happy on the job, did he continue his employment, conveys to employee that management considers engaging in union activity and continued employment essentially incompatible); *NLRB v. Crystal Tire Co.*, 410 F.2d 916, 918 (8th Cir. 1969) (statement to employees if they wanted a union, then they should work for another company).

During the above conversation (also, as noted, in Kim's presence and not disavowed by Kim), Chun told Silva that Respondent was not going to sign a contract and that the "Union is not going to come here." This statement by Chun is also an unlawful threat of futility of Section 8(a)(1) of the Act. *Equipment Trucking Co.*, 336 NLRB 277, 283 (2001); *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993); *Airtex*, 308 NLRB 1135 fn. 2 (1992). I so find.

Finally, I have found above that employee Martinez told a fellow employees that Chun had informed that employee that Martinez, Gonzalez and Silva were "fatheads" and that Chun informed the employee not to talk to Martinez and "that you are bad people because you called the Union."

Gonzalez had a similar conversation with a different fellow employee, who informed him that Chun had instructed this employee not to talk to Gonzalez. A union representative was informed in March by an employee that the employee could not talk to Diaz because he had been told that he could not talk to Diaz because he would be fired. I find that these comments by Chun were further violative of Section 8(a)(1) of the Act. *P.S.K. Supermarkets*, 349 NLRB 34, 36 (2007) (directive to employee "not to be seen speaking with anyone from the union"); *Airport 2000 Concessions, LLC*, 346 NLRB 958, 959 (2006) (supervisor's instructions to employee not to speak to union organizer is unlawful).

I recognize that these findings are based on hearsay testimony from Gonzalez, Silva and Diaz as to what Chun told the respective employees. However, the Board permits and relies on hearsay evidence, where such evidence is probative and corroborative. *Dauman Pallet*, 314 NLRB 185, 186 (1994); *RJR Communications*, 248 NLRB 920, 921 (1980); *Livermore Joe's Inc.*, 285 NLRB 169 fn. 3 (1987).

Here, I find that the credited testimony of the three witnesses presents corroboration of the similar comments allegedly made to three different employees by Steve Chun.

I find additional corroboration of this hearsay testimony from the direct testimony of Silva, that I have credited above, wherein Chun made similar comments directly to Silva in the presence of Kim, who did not disavow these statements made by Chun.

I, therefore, conclude that Respondent further violated Section 8(a)(1) of the Act by these comments made by Steve Chun to employees.

[24] See *Intertherm*, 235 NLRB 493 (1978).

C. The Alleged Surface Bargaining

Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment…but such obligation does not compel either party to agree to a proposal or require the making of a concession...." "Both the employer and the union have a duty to negotiate with a 'sincere purpose to find a basis of agreement,'" *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960)), but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." Id. (quoting *NLRB v. Reed & Prince Mfg. Co.,* 205 F.3d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all." Ibid. (Emphasis in original.) Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit cooperation does not satisfy the requirements of the Act." *Mid-Concrete,* 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.,* 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.,* 344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. Id.; *Pease Co.,* 237 NLRB 1069, 1070 (1978).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.,* 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower,* supra, at 1603. From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO,* 334 NLRB at 487.

The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, arbitrary scheduling of meetings, and insistence on non-mandatory subjects of bargaining, *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996). A*tlanta Hilton & Tower,* supra, at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.,* 332 NLRB 130, 148 (2000). Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement. See Id at 130 fn. 2.

I conclude that based on the totality of conduct that Respondent conducted its negotiations with a closed mind, which included a series of roadblocks designed to thwart and delay bargaining. *Fallbrook Hospital*, 360 NLRB No. 73 ALJD slip op at 9 (2014).

I note that although the Union was certified on September 20, and shortly thereafter the Union by Caffey requested the commencement of negotiations, Respondent throughout its first attorney, Ron Pfeiffer, initially refused to meet, stating that Kim would not meet with the Union because of the boycott and demonstrations. Caffey replied that the Union had nothing to do with the demonstrations or the boycott and that the Union was certified and wished to commence

negotiations.

After that conversation, Respondent finally relented and agreed to a meeting on November 28, unreasonably delaying negotiations for over two months. However, when negotiations began, Respondent's representatives continued to assert that Kim was angry about the demonstrations and the boycott and that Respondent was losing money as a result. Thus, Respondent would not discuss any economic issue until the boycott stopped. Caffey reiterated that the Union did not participate in and was not supporting the boycott and attempted to discuss some economic items in its proposal that it had submitted. Respondent's representatives responded that Kim was not approachable about these issues because of the boycott.

Thus, it is clear that from the start of negotiations and until June of 2013, Respondent has refused to discuss economic issues until the demonstrations and boycott have ended.

It is well-settled that the insistence on a non-mandatory or permissive subject of bargaining is unlawful and an indicia of bad faith bargaining. *Fallbrook Hospital*, supra at 11; *Universal Fuel Inc.*, 358 NLRB No. 150 at 1 and ALJD slip op at 20 (2012); *ServiceNet Inc.*, 340 NLRB 1245, 1246-1247 (2003); *Quality House of Graphics*, 336 NLRB 497, 507-509 (2001); *Grosvenor Orlando Associates*, 336 NLRB 613, 615 (2001); *Tennessee Construction Co.*, 308 NLRB 763 (1992); *Pleasantville Nursing Home*, 335 NLRB 961-963 (2001); *Briarcliff Pavilion*, 260 NLRB 1374, 1377 (1982).

Here, Respondent's insistence that it would not bargain economic issues until the Union stops the demonstrations and boycotts by third parties (NYCC and Occupy Kensington) is unlawful and indicative of bad faith bargaining, as set forth in the above cited precedent.

While Respondent may have believed that the Union was involved in or responsible for the boycotts and demonstrations, the evidence does not so establish, and I have credited Caffey that the Union was not involved in nor supported the demonstrations or the boycott and that, in fact, had attempted to persuade NYCC to stop this conduct when the Union became certified was initially unsuccessful in persuading it to do so. Eventually, in March, after the repeated refusals of Respondent to negotiate on economic issues was reaffirmed by Kim himself at his brief appearance at the only session that he attended, Caffey was able to persuade NYCC and Occupy Kensington to suspend its demonstrations and boycott activities, which ceased at that time.

Respondent did adduce some evidence in this proceeding that some of the demonstrations were from NYCC wearing union buttons from time to time and that one employee of Respondent gave Kim a union authorization card, which the employee allegedly told Kim was given to him by an individual at the demonstration. This evidence hardly suffices to establish union involvement in or responsibility for the third parties' conduct.

Indeed, Respondent asserted during the representation case that there was a relationship between NYCC and the Union by claiming that Sanchez, a NYCC representative, was an agent of the Union and made objectionable comments. However, the hearing officer concluded that Respondent had not established that Sanchez was an agent of the Union and the Union was not responsible for his conduct. Thus, his statements to employees must be judged under third party standards for evaluating objectionable conduct. In this regard, the hearing officer concluded that Sanchez's statements to employees with respect to possible monetary rewards related to the participation of employees in the lawsuit against Respondent, then in process, rather than for supporting the Union. I note that Respondent filed no exceptions

to the hearing officer's report and these findings were adopted by the Board when it issued its certification.

Further, this conduct of Respondent, failing and refusing to discuss economic issues until the boycott stopped, unreasonably delayed bargaining and is an indication of Respondent's bad faith bargaining, whether or not the stopping the boycott and demonstrations was a non-mandatory subject or not. The fact is that Respondent delayed discussing economic issues for over six months and engaged in rather limited discussions of economic issues even after the boycott and demonstrations ended. Such conduct is reflective of bad faith bargaining. *Health Care Service Group*, 331 NLRB 333, 336 (2008) (failure to make proposals for 6 ½ months indicative of bad faith); *Erie Brush Mfg.*, 357 NLRB No. 46 at 2, ALJD slip op at 11 (2011) (employer refused to discuss economics until union changed its position); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1041-1043 (1996) (respondent submitted its proposals five months after union submitted its proposal); *Hyrdotherm Inc.*, 302 NLRB 990, 1005 (1991) (no economic proposals for over three months, despite union having made several over two bargaining sessions); *United Technologies*, 296 NLRB 571, 572 (1989) (employer made no counterproposals to the union for 7 months, and no economic proposals at all after 1 year of bargaining); *Southside Electric Cooperative*, 243 NLRB 390, 397 (1979); *Inter-Polymer Industries*, 196 NLRB 729, 761 (1972) (15 weeks and 7 meetings before employer submitted any economic proposal).

Respondent's bad faith was further demonstrated by its position in bargaining, as stated by its representative, that it would not agree to the Union's proposal for a recognition clause, providing that it recognize the Union as the exclusive collective bargaining representative of its employees because Kim had a problem with recognizing the Union as the exclusive bargaining representative of its employees. While the Union simply responded that Respondent would have to so recognize the Union in view of the certification, and Respondent eventually agreed to the Union's recognition clause as submitted consistent with the certification, this initial position is symptomatic of its bargaining posture throughout and its refusal to accept the results of the election and the obligation to recognize and bargain with the Union, pursuant to that certification.

Initially, Respondent refused to accept the Union's shop steward clause and insisted on the right to select the Union's steward. This is a clear interference with the Union's internal affairs and is also indicative of bad faith bargaining. While subsequently Respondent backed off from this counterproposal and agreed that the Union could select the shop steward to represent the employees, Respondent's position on this issue obstructed bargaining. It's bargaining continued to reflect its rejection of the Union's role as the representative of its employees by initially refusing to deal with the union representative in the processing of the grievances under the grievance procedure and insisting on dealing with the shop steward only with respect to these matters. While this position was again eventually dropped by Respondent and it agreed to meet with the union representative during the grievance process, its initial position on this issue was reflective of bad faith bargaining and obstructed the bargaining process. Indeed, even though Respondent finally agreed to meet with the union representative during the grievance procedure, pursuant to the arbitration and grievance procedure clauses tentatively agreed to by the parties, the issue of whether the Union would be able to meet with the Respondent on the Respondent's premises was still not resolved inasmuch as Respondent had still refused to agree to the Union's access proposal.

Thus, the tentative agreement by Respondent on the grievance and arbitration clauses is somewhat illusory inasmuch as the union representative cannot meet with Respondent on the Respondent's premises during the grievance procedure.

This continuing refusal of Respondent to accept the Union's role as the representative of its employees is further manifested by its obdurate refusal to agree to or bargain about the Union's access proposal. In that regard, the Union proposed that the Union be permitted access to the store as long as the visit does not disrupt the regular business operations. Respondent rejected this proposal and continued to do so throughout negotiations by stating that Respondent did not want a union representative or any type of agent at the facility. Kim explained this position by asserting that Respondent believed that the Union was responsible for the boycott and demonstrations, which had caused disruptions in the store. However, as noted above, the Union was not involved in or responsible for these demonstrations and boycotts and, more importantly, these activities had ceased at the behest of the Union in March. Yet, Respondent persisted in refusing to permit access to its store by union officials at any time for any purpose.

While access to its premise by union officials is a mandatory subject of bargaining and need not be agreed to, Respondent does not satisfy its obligation to bargain about that subject by simply rejecting the Union's requested proposal with a blanket refusal to allow the Union access to its premises at any time for any purpose. *C.C.E. Inc.*, 318 NLRB 977, 978 (1995) (denial of access to union representative, especially in first contract negotiations, prevents union from gaining complete understanding of its operations and prevents employees from gaining the representation that they voted for in the certification election); *Holyoke Water Power*, 273 NLRB 1369, 1370 (1985) (property right of employer must be balanced against union's right to access). Here, Respondent's store is open to the public, and no evidence was presented that permitting access to union representatives would or could interfere with Respondent's business. Indeed, the Union's proposal that the Respondent rejected allowed access as long as it does not disrupt business operations, which would alleviate any justifiable concerns about union representatives' presence inside the store. I, therefore, conclude that Respondent's unyielding posture of refusing access of any union representative to its store, without any counterproposals, is a further indicia of bad faith bargaining and a continuation of its refusal to accept the results of the certification and the recognition that the Union is the exclusive bargaining representative of its employees.

I also agree with General Counsel that Respondent's bargaining over union security was reflective of bad faith bargaining inasmuch as its continuing opposition to these proposals was without legitimate business justification and indicative of a closed mind. The Board, support by the Courts, has made such findings in numerous cases. *Universal Fuel*, supra, 358 NLRB No. 150 at 1, ALJD slip op at 1; *Chester County Hospital*, 320 NLRB 604, 622 (1995), enfd. 116 F.3d 469 (3rd Cir. 1997); *Langston Companies*, 304 NLRB 1022, 1058, 1061 (1991); *CJC Holdings*, 320 NLRB 1041, 1047 (1996), enfd. 110 F.3d 794 (5th Cir. 1997); *Sivalls Inc.*, 307 NLRB 986, 1009, fn. 46 (1992); *A-1 King Size Sandwiches*, 265 NLRB 850, 854-860 (1982), enfd. 732 F.2d. 872, 876-877 (11th Cir. 1984); *Rockingham Machine-Lunex Company*, 255 NLRB 89, 107 (1981); *Hospitality Motor Inn*, 249 NLRB 1036, 1040 (1980); *Preterm Inc.*, 240 NLRB 654, 673 (1979); *Betra Mfg. Co.*, 233 NLRB 1126, 1133 (1977); *Queen Mary Restaurants*, 219 NLRB 776, 795, 796 (1975), enfd. 560 F.2d 403, 409 (9th Cir. 1977); *Carolina Paper Board*, 183 NLRB 544, 550-551 (1970); *Kayser-Roth Hosiery*, 176 NLRB 999, 1004 (1969), enfd. 430 F.2d 701 (6th Cir. 1970); *Sweeney & Co. Inc.*, 176 NLRB 208, 211 (1969), enfd. 437 F.2d 1127, 1134-1135 (5th Cir. 1971); *Roanoke Iron Works*, 160 NLRB 175, 181 (1996), enfd. 390 F.2d 846, 849 (DC Cir. 1967).

The most compelling evidence of Respondent's bad faith bargaining is demonstrated by its conduct concerning its last offer, which it conveyed to the Union during the August 23 conference call.

It is significant to note that this August 23 meeting was less than a month from the end of the certification year, which expired on September 20. As of that date, Respondent had still not submitted any offer of wages and had made limited counteroffers on a few economic issues, such as vacation, sick leave and holidays, but no tentative agreements had been reached on these issues.

The Union had been pressing for a wage increase and, in fact, had bargained against itself by lowering its demands to a fifty cents an hour increase for a one-year contract or a $1.00 per hour increase in a three-year contract with forty cents for the first year.

During the course of this session, which was conducted by conference all, there was a caucus. When the call resumed, Caffey from the Union had been called away, but LaRuffa continued to represent the Union. At that time, Coleman stated that it had an offer to convey but added that he and Mieluchowski had not discussed it with Kim and had yet received Kim's ok, but if the Union agreed, it would go back to get Kim's approval and that he felt with their strong support and urging that Kim would agree to the proposal. The proposal was for a contract lasting until December 31 with a raise of fifty cents an hour immediately for employees and that the Union must agree to prevent any third parties from engaging in picketing or boycotting the store. Coleman added that the Union had a deadline of 11:59 p.m. on Monday, August 26 to accept the offer. Coleman did not explain the reason for this deadline.[25]

LaRuffa replied that they would present the offer to the Union (since Caffey was not there by that time) but asked Respondent to send the offer in writing. At 1:54 p.m. that day, LaRuffa sent an email to Respondent, stating "subject to the Union's review of the Company's tentative proposal which you will be sending, the Union is suggesting to meet either in person or via conference call on either 8/28, 8/30 or 9/6. Please advise asap."

Respondent never sent the proposal in writing as requested by LaRuffa, and instead Mieluchowski sent an email on August 24, reiterating that their offer is on the table only until 11:59 p.m. on August 26, and Respondent believed that the Union rejected the offer by LaRuffa's request for more meetings. Thus, Respondent would not send a written offer and added that unless the last offer is agreed to, there appears little point in further meetings.

LaRuffa responded that he wanted the proposal in writing as promised and added that he had not declined or accepted the offer but wanted the offer in writing so that the Union could review it.

Respondent responded by repeating its assertion made in the prior email that since LaRuffa had asked for additional negotiation dates in his initial response, the Union was rejecting Respondent's offer and that the deadline for acceptance had passed.

I find Respondent's conduct, as detailed above, to be filled with several indicia of bad faith bargaining. Initially, I note that Respondent in presenting its last and ultimately its final offer, Respondent stated that the offer, which was Respondent's first and only wage increase offer, was subject to the approval of Kim. While its negotiators had previously entered into tentative agreements on several proposals, mostly non-economic in nature, in this instance for the first time, its negotiators stated that it needed to get Kim's approval for the offer and had as

[25] At trial, Mieluchowski testified that the reason that Respondent imposed the deadline was because Coleman was due to be on vacation from August 27 through mid-September.

of yet, not done so.

It is well-settled that the duty to bargain includes the obligation to appoint a negotiator to carry on meaningful bargaining regarding fundamental issues. *Wycoff Steel*, 303 NLRB 517, 525 (1991); *Natural Amusements Inc.*, 155 NLRB 1200, 1206 (1965). Although an employer is not required to be represented by an individual possessing final authority to enter into an agreement, this is subject to a limitation that it does not inhibit the progress of negotiations. *United Brotherhood of Carpenters, Local 1780*, 244 NLRB 277, 281 (1979). See also *J.P. Stevens & Co., Inc.*, 239 NLRB 738, 768 (1978).

Here, the importance of Respondent's last, and indeed only, wage offer cannot be overstated as a wage increase was indisputably an important issue for the Union. In fact, as noted above, the Union had bargained against itself by lowering its wage increase demands from its previous offer without a counter from Respondent. Thus, when Respondent finally conveyed its first and only offer on this subject, it did so with the caveat that it had not received approval of Kim, Respondent's principal. Particularly, where, as here, Respondent made this offer with an arbitrary deadline for acceptance of two days from the offer to make it without the approval of Kim and to inform the Union of the same is, in my judgment, a hindrance to the overall negotiations and indicative of bad faith. *J.P. Stevens*, supra; *Wycoff*, supra; *Local 1780 Carpenters*, supra.

As also noted, the offer was subject to a deadline of August 26, giving the Union three days to accept the offer.[26]

Respondent did not furnish the Union any reason for this arbitrary deadline for acceptance of the offer. The setting of arbitrary deadlines for acceptance of offers has been deemed by the Board to be indicative of bad faith by an employer. Here, I conclude that Respondent furnished no reason for its arbitrary deadline of August 26 to accept its offer. Its *post hoc* explanation by Mieluchowski's testimony that it did so because Coleman would be on vacation from August 27 through September 15, hardly suffices as an adequate reason for the deadline. It only serves to reinforce the conclusion that I draw that it was motivated by the impending end of the certification year (September 20), and Respondent's desire to insure that negotiations break down by that time. While Respondent never declared actually impasse in bargaining, it, in effect, did by refusing to meet with the Union since the Union had not accepted Respondent's last offer and stating that in view of that refusal, it saw no need for any further meetings.

I, therefore, conclude that Respondent's arbitrary deadline for acceptance of its last offer was destructive of the bargaining process and is further evidence of its bad faith bargaining. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008); *Newcor Bay City Division*, 345 NLRB, 1229, 1241 (2005) (artificial deadline for acceptance of offer coinciding with contract's expiration); *Ead Motors*, 346 NLRB 1060, 1064 (2006) (artificial deadline truncated negotiations).

Further, Respondent's last offer provided for an expiration date of December 31, essentially a contract of four months duration. A contract of unreasonably short duration without adequate explanation has long been considered significant evidence of bad faith bargaining. *Cleveland Sales Co.*, 292 NLRB 1151, 1155-1156 (1989) (offer of 3 months and 8 days duration); *Briarcliff Pavilion*, supra, 260 NLRB at 1377 (4 ½ month contract, linked closely to end of certification year); *Deister Concentrator*, 253 NLRB 358 (1980) (3 ½ months); *Insulating*

[26] Notably, two weekend days including Saturday and Sunday.

Fabricators, 144 NLRB 1325, 1329-1330 (1963) (6 months); *Huck Mfg. Co.*, 254 NLRB 739, 755 (1981) (2-month contract corresponding to end of certification year); *Holmes Tuttle*, 186 NLRB 73, 82-83 (1970) (2-week contract to expire at end of certification year).

Here, Respondent provided no explanation for its insistence on a contract of four months duration. Indeed, none is apparent other than the obvious proximity to the expiration of the certification year. *Briarcliff*, supra.

This proposal by Respondent provides substantial evidence of bad faith bargaining by Respondent in these circumstances.

This conclusion is fortified by the fact that Respondent's offer was a regressive proposal by Respondent, inasmuch as it had previously offered a contract of one year's duration shorter, although the Union was still seeking a three-year contract.

While regressive proposals are not automatically evidence of bad faith bargaining when they are interposed without any or unreasonable explanation, they can be evidence of bad faith. *Clarke Mfg. Co.*, 352 NLRB 141, 145 (2008); *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001).

Thus, Respondent's regressive proposal of reducing the duration of the contract from one year to four months without any explanation leads to the conclusion that I draw that it was interposed in bad faith and further evidence of its engaging in surface bargaining.

I also rely upon Respondent's refusal to supply a written copy of its last offer as promised. As related above, Caffey was not present when, after the caucus ended, Respondent conveyed its offer. LaRuffa asked that it be sent in writing so he could present it to Caffey. Respondent agreed to do so but did not, even after LaRuffa renewed the Union's request. I find this conduct by Respondent inexcusable and further demonstrative of Respondent's bad faith. This was indeed Respondent's first and only wage offer, and it also involved various other conditions, such as a four-month duration and the Union's agreement to prevent third-party picketing or boycotts.

The record is somewhat uncertain as to whether the offer included Respondent's previous counteroffers on such issues as vacations, holidays and sick days, and indeed, Respondent's cross-examination sought to establish that these offers had not been withdrawn prior to the conveyance of the last offer. Thus, it was important to send that offer to the Union in writing, so that there could be no dispute as to what was included, particularly where Respondent had added a deadline of three days to accept the offer.

I conclude that Respondent was determined to cut off negotiations and end bargaining prior to the end of the certification year, which it did, in anticipation of a decertification petition and wanted to make sure that the Union would not accept its offer. Thus, this accounts for the roadblocks that it set up for its acceptance, such as the arbitrary deadline for acceptance of its offer and the refusal to put the offer in writing. *South Carolina Baptist Ministries*, 310 NLRB 156 (1993) (refusal to put in writing proposals found to be evidence of bad faith and impeding bargaining process).

I also note Respondent's inclusion of the non-mandatory subject of bargaining (Union must agree to prevent third-party picketing and boycotts) in its last offer. It is significant that Respondent had previously taken the position early in bargaining, as I detailed above, that it would not discuss economic issues until the demonstrations and boycotts by the third parties

ceased. I concluded above that conduct was reflective of bad faith bargaining, a conclusion which I do not change, but note that after the boycott ended, Respondent commenced discussing economic issues, and ultimately made a wage offer on August 28. However, in the same offer, Respondent renewed its previously withdrawn unlawful demand of its offer by demanding that the Union agree to prevent any third party from picketing or boycotting Respondent. Such conduct is further reflective of bad faith and makes its final offer "predictably unacceptable" to acceptance since the Union cannot agree to prevent any third party from boycotting or picketing the Respondent.

Finally, I note that the Board also considered conduct both away from the table and the table in examining an employer's conduct of a real desire to reach agreement. *South Carolina Baptist*, supra; *Overnite Transportation*, 296 NLRB 669, 671 (1989); *Mid-Continent Concrete*, supra, 336 NLRB at 261; *U.S. Ecology Corp.*, 331 NLRB 223, 224 (2000).

Here, I found above that Respondent violated Section 8(a)(1) of the Act by virtue of numerous statements of its agent, Steve Chun. These comments included statements that Respondent would never sign a contract as well as threats to discharge union supporters. These kinds of statements are reflective of and evidence of Respondent's bad faith and its intention not to reach agreement with the Union. *South Carolina Baptist*, supra; *Overnite Transportation*, supra (telling employees that employer would not sign contract and threatened with job loss); *Mid-Continent Concrete*, supra (statements that bargaining would be futile); *U.S. Ecology*, supra (statement that there would be no contract regardless of what the union did).

Even more significantly, I rely on Steve Chun's statements made to the union representatives in late August and in September, some of which were heard by employees, such as Gonzalez. On these occasions, after the Union began its picketing, after Respondent cut off negotiations, as I have detailed above, and utilized a rat in front of the store, plus the presence of two union representatives.

Chun came outside the store and made similar comments to Diaz, such as Kim wasn't going to sign a union contract and they (the Union) was wasting their time. Chun, in later conversations, began to taunt the union representatives by telling them that there "were only 10 days left for your union," and repeated that no contract is going to be signed. Chun then continued similar comments over the next few days, such as "you've got three more days left for your contract year to be over," and that the Union was out of here in a day or two," and then adding that Gonzalez (the main union advocate) would be fired once the union is out of here."

These comments made by Chun in September, shortly before the certification year was to expire, is highly probative of Respondent's bad faith bargaining and its conduct at the bargaining table.

These comments clearly are indicative of Respondent's intention to draw out the negotiations until the certification year had passed. *Mid-Continent Concrete*, supra at 258; *U.S. Ecology*, supra; *Overnite Transportation*, supra. See also *Burrows Paper*, 332 NLRB 82 (2000) (statements to union representative about another vote and questioning why anyone would want to be a union member after certification year ended).

Accordingly, I conclude based on the totality of Respondent's conduct, both at and away from the table, as detailed above, that it has bargained in bad faith with the Union and its conduct did not evidence a sincere desire to enter into an agreement with the Union.

It has, therefore, engaged in surface bargaining in violation of Section 8(a)(1) and (5) of the Act. *Fallbrook Hospital*, supra; *Universal Fuel*, supra; *Health Care Service*, supra; *Chester County Hospital*, supra; *Whitesell Corp.*, supra; *Cleveland Sales*, supra; *Holmes Tuttle*, supra; *Mid-Continent Concrete*, supra; *South Carolina Baptist*, supra; *Overnite Transportation*, supra.

D. The Alleged Refusal to Meet

The complaint alleges that on or about August 27 Respondent refused the Union's request to meet and bargain with the Union. I agree.

This conduct continued until, and, of course, after its withdrawals of recognition from the Union in October and June.

Respondent disputed that it had refused to meet and bargain with the Union on or after August 27 and argues that the Union had not requested any further meetings after allegedly "rejecting" Respondent's offer and instead chose to file a charge with the Board and engage in picketing of Respondent.

I cannot agree. The Union had, in fact, requested that negotiations continue and offered several negotiation dates for additional sessions, either in-person or by teleconference.

Respondent rejected the Union's request for further meetings by Mieluchowski's email to LaRuffa, wherein he stated that Respondent viewed the Union as having rejected Respondent's offer by not accepting it within the timeframe required, and, therefore, Respondent saw no need for further meetings.

While the email asserted that Coleman, Respondent's attorney, was not available on the dates proposed by LaRuffa because of Coleman's vacation, that did not preclude meeting on other dates, and it was incumbent on Respondent to propose additional dates when Coleman would be available. It is, of course, notable and not without significance that all of the dates requested by the Union were within the certification year.

This is further supportive of my conclusion, set forth above, that Respondent's bargaining was not in good faith and motivated by a desire to run out the string and that a decertification petition could and would be filed, which coincidentally happened, as detailed above and below, in late September when the employees signed a petition seeking to get rid of the Union, which petition was given to Respondent.

I find that Respondent independently violated Section 8(a)(1) and (5) of the Act from on August 27, and of course, including the period after it withdrew recognition in October and November.

At no time during these periods did Respondent agree to the Union's request to meet and bargain, and its failure to do so is violative of the Act, apart from the validity of the petition and the withdrawal of recognition. For the period between August 27 and October, the Union was still the certified bargaining representative of Respondent's employees, and it refused to meet and bargain with the Union, even though it had not received any petition from the employees or had any evidence that the Union had lost its majority status.

I conclude, therefore, that Respondent violated Section 8(a)(1) and (5) of the Act by this conduct.

E. The Withdraw of Recognition and the Petition

There is no dispute that Respondent withdrew recognition from the Union in October and again in November based upon a petition signed by a number of its employees, which Respondent received sometime in October.

General Counsel contends the Respondent's withdrawals of recognition from the Union was violative of 8(a)(1) and (5) of the Act and has made several alternative arguments in support of its position. I shall consider and decide all of these contentions and arguments in view of the possibility of reversal by the Board on General Counsel's primary argument that the withdrawal of recognition by Respondent is unlawful.

Respondent may not lawfully withdraw from the union unless it can establish that the Union has, in fact, lost the majority support of its employees in the bargaining unit. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 724-725 (2001).

However, even if an employer establishes that a union has lost its majority support, it cannot withdraw recognition, where the employer is engaged in unremedied, unlawful conduct that tainted the filing of any petition, establishing loss of majority support or, indeed, any other evidence that proves that the union no longer enjoys the support of the unit employees. *Erie Brush Mfg.*, 357 NLRB No. 46 slip op at 2-4, ALJ slip op at 11-12 (2011); *Lee Lumber*, 322 NLRB 175 (1996), affd. in part and remanded in part, 117 F.3d 1454 (DC Cir. 1997).

The surface bargaining finding that I have made, as detailed above, is sufficient in itself to taint the petitions and to render Respondent's withdrawal of recognition unlawful, even if Respondent had no involvement in the petitions. *Radisson Plaza*, 307 NLRB 94, 96, 115 (1992); *Prentice-Hall, Inc.*, 290 NLRB 646-647, 673 (1988).

I so find here, and rely additionally on my findings above, that Respondent refused to meet with the Union on and after August 28 at a time when the certification year had not yet expired, even though the petition had not been signed or shown to Respondent. I also note the testimony of Mieluchowski, Respondent's negotiator, who asserted that Kim did not want to agree to a union security clause because, in part, of the closeness of the election (Union won by one vote). Thus, Respondent reflected that it was counting on the chance that the slim majority by which the Union won the election and the passage of the certification year without any real prospect of a contract would culminate in a sufficient expression of employee dissatisfaction with the Union to permit Respondent to do what it finally did and withdraw recognition from the Union. *Prentice-Hall*, supra, 290 NLRB at 646.

As noted above, General Counsel has advanced various alternative arguments in contending that the withdrawal of recognition was unlawful, which need to be considered, particularly, in the event that a higher authority disagrees with my surface bargaining and refusal to meet findings, detailed above.

General Counsel contends initially that Respondent had not met its burden of establishing that the Union has lost its majority status. *HQM of Bayside*, 348 NLRB 758, 759 (2006).

In this regard, the first petition contained 26 signatures. Respondent's purported list of bargaining employees contained 32 names. Four of the signatures were dated August 28, including the signatures of Cuautle. The other three signatures dated August 28 were that of Marcos Gomez, Jose Perez and Rolando Yomez. Cuautle testified, as related above, that the

dates on these documents were incorrect and were misdated and should have been September 28, instead of August 28. Cuautle testified credibly that his signature was placed first on the petition and he misdated it August 28, instead of September 28. Then, when the other three employees signed the petition, they followed along and put in the same misdate of August 28 that Cuautle had filled in next to his signature. I find Cuautle's testimony credible and believable and consistent with the testimony of all the other witnesses, such as Garcia, Jimmy, Bong and Kim, that the petitions were circulated in late September and early October. I, therefore, conclude that these signatures are valid and were, in fact, signed on September 28 and that they can be counted as having demonstrated a desire not to be represented by the Union.

General Counsel also asserts that the signatures of Joon Chal Lee and Noh Soon Park cannot be counted since Respondent has not established that either one was employed by Respondent in the bargaining unit. General Counsel relies on the fact that the wage statements provided for General Counsel in response to its subpoena that wage statements were not included for these employees. Kim testified that both of the employees were employed by Respondent, Lee as a buyer and Park as a night-time cashier, at the time of the petition and were still employed by Respondent at the time of the trial. He speculated that his wife Sharon, who had prepared the documents to be submitted to General Counsel pursuant to the subpoena, must have overlooked the wage statements for these employees. I find Kim's testimony credible, particularly since it is implicitly corroborated by Jimmy, who testified that he solicited the signatures of Park and Lee, who were both employees of Respondent working at night on the evening of October 1, 2013.[27]

Accordingly, I conclude that they were both employed by Respondent at the time that they signed the petitions. However, Lee was and is a buyer, and according to the certification, a buyer[28] is specifically excluded from the unit.

Therefore, the signature of Lee should be not counted as demonstrative of loss of majority support since that employee was not in the unit. Thus, the number of employees in the unit should be reduced from 32 to 31, and the number of signatures reduced from 26 to 25.

General Counsel also notes that Steven Chun's name was not on the list, and he did not sign the petitions. Some testimony was adduced that Steve was out sick or not at work when the petitions were signed in September and October and that when the second petitions were signed in late October and early November, it was decided not to ask Steve to sign since he had not signed the first one.

The fact is, whether Chun was out sick or not, he was still in the unit at the time of the petitions and was part of the unit. He was an employee of Respondent, and although I have found that he was an agent of Respondent, he was not a supervisor and was part of the bargaining unit.

Therefore, his name should have been included on the list of unit employees, which bring the unit back up to 32, with 26 signatures. General Counsel asserts that two signatures are duplicates but does not identify them. Assuming that there are two duplicates, the majority of unit employees have still been proven to have signed the petitions. I, therefore, reject General Counsel's assertion that Respondent has not established that a majority of unit employees wished not to be represented by the Union.

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[27] Both Park and Lee also signed the second petition on October 30.

[28] Based on Kim's own testimony and Respondent's schedule.

General Counsel also argues that the petitions are invalid and cannot be used to support the withdrawal of recognition because Respondent has violated the Act by rendering more than ministerial aid to the petitions. *Armored Transport Inc.*, 339 NLRB 374, 377 (2003).

General Counsel relies on speculation and the inconsistencies in testimony of Bong and Kim as to the circumstances of the petition submissions to Kim and to Respondent's attorney. General Counsel argues that Kim had a business relationship with Bong since they were both members of the Korean Business organization and, therefore, they must have discussed the petitions before they were signed and sent to Respondent's counsel and that Kim must have directed Bong to prepare and circulate the petition.

I agree with General Counsel that there are significant inconsistencies between the testimony of Kim and Bong about various matters, including who placed the number of employees to the names on the list that Respondent's sent to Respondent's attorney. I also agree that the record establishes that Bong and Kim spoke about the petitions before they were prepared and circulated and that Kim was the one (contrary to Bong's testimony), who placed the numbers on the list next to the names submitted to the attorney, based on the list of employees prepared by Kim himself. Indeed, Kim admitted that he discussed the petitions with Bong before they were circulated and that Bong informed Kim that he was preparing to circulate a petition along with his son, Jimmy, to get rid of and to decertify the Union. Kim further testified that he responded that it was up to Bong and Jimmy to do it or not.

I find that testimony credible and cannot conclude, as General Counsel apparently contends, that Kim directed or even encouraged Bong to engage in the decertification effort and circulate the petitions.

I also conclude, based on the overall evidence, including, particularly, the email sent by Bong to Mieluchowski, in forwarding the October petition to him, that it was Kim, who had written in the numbers corresponding to the employees, who signed based on Kim's preparation of the list of Respondent's employees and his comparison of the signatures. I find, therefore, that this information was sent by Bong to Mieluchowski after Kim prepared the list and inserted that corresponding numbers next to the signatures.

Nonetheless, I do not believe that this evidence establishes that Respondent provided more than ministerial assistance to the petitioners.

The evidence does not establish that Kim directed or encouraged the petitions' circulation. He merely told Bong, when Bong informed him of the intentions of his son and himself to circulate a petition to decertify to get rid of the Union, that it was up to Bong and Jimmy to do it or not.

Thus, while Kim discussed circulation of a decertification petition to get rid of the Union with Bong before it was prepared and circulated, Kim did not solicit or encourage Bong to engage in that conduct. Kim merely told Bong that it was up to Bong and Jimmy to do it or not.

In short, Kim was informed that the employees intended to circulate the petition and that Kim's conduct was telling Bong that he could do it or not. While Kim, *after* the petition was circulated and signed by employees and shown to him, made a list of unit employees, calculated the number of employees, who signed and placed numbers on the petition, corresponding to the list and furnished the email of Respondent's consultant to Bong, so that Bong could send the petition to him, this conduct cannot be construed as coercing or interfering

with the petition since it occurred after it was signed by the employees.

Thus, Respondent's conduct was limited to aiding the employees in their expression of their predetermined objectives. *Eastern States Optical*, 275 NLRB 371 (1985) (employees attorney's conduct in assisting employees with wording of decertification petition, telling him to contact the NLRB about it and subsequent providing information to employees about information necessary to process Board's forms, such as employee unit, names of employer's officials and whether number of signatures obtained were sufficient, found insufficient to constitute more than ministerial assistance to petition since employer did nothing to encourage petition, contacted was initiated by employee and employer did little more than render editorial suggestions and supply factual information); *Poly Ultra Plastics*, 231 NLRB 787, 790 (1977) (involvement of supervisor in preparation of language for petition to be sent to NLRB); *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967) (employee asked employer how to get rid of union and was told to contact NLRB and suggested language to use in letter to NLRB, held conduct of employer insufficient to establish that "petition filed did not constitute free and uncoerced act of employees concerned").

I, therefore, reject General Counsel's alternative contentions with regard to Respondent's involvement in the petition and do not find that Respondent rendered anything more than ministerial assistance to the employees in their desire to end union representation.

However, as I have detailed above, Respondent's surface bargaining and refusals to meet and bargain with the Union, prior to the petitions being signed and sent to Respondent, taints the petitions, and Respondent cannot rely on them to withdraw recognition from the Union.

Accordingly, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition in October and November.

Conclusions of Law

1. Golden Farm Brooklyn, Inc. d/b/a Golden Farm Grocery is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been the certified exclusive collective bargaining representative for the Respondent's employees in the following appropriate unit:

> All regular and full-time employees, including cashiers, clerks, stock persons, drivers and general merchandise handlers, employed by Respondent, at its Brooklyn, NY facility, excluding managers, buyers, office clerical employees, guards and supervisors as defined in the Act.

4. By threatening its employees with termination, with futility of their support for the Union as Respondent would never sign a contract with the Union and directing employees not to speak to union representatives or to employees, who support the Union, Respondent has violated Section 8(a)(1) of the Act.

5. By refusing to meet and bargain with the Union, by engaging in surface and bad faith bargaining with the Union and by withdrawing recognition from the Union, Respondent has

violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent meet and bargain in good faith with the Union, and if an understanding is reached, embody it in a signed agreement.

Inasmuch as I have found that Respondent has bargained in bad faith with the Union from the inception of bargaining as well as a refusal to meet with the Union for a period of time, even before the petition was submitted to it, I shall recommend that the certification year be extended by one year from the date that good faith bargaining begins. *Fallbrook Hospital*, supra, 360 NLRB No. 73 slip op at 2; *Regency Service Carts*, 345 NLRB 671, 727 (2005); *Mar-Jac Poultry*, 136 NLRB 785 (1962).

General Counsel also requests that Respondent be required to meet with the Union within 15 days of a Board Order and for a minimum of 24 hours until an agreement is reached or lawful impasse reached. I find such a remedy is not necessary and that the standard order requiring Respondent to meet and bargain is sufficient to remedy the unfair labor practice that I have found. I note that Respondent did meet with the Union regularly either in-person or by conference call and bargained over a period between November 28, 2012 and August 28, 2013. Although Respondent did, as I have concluded, refuse to meet on and after August 28 with the Union, even though the Union had requested additional meetings, this refusal was not for an extended time and it continued only because Respondent withdrew recognition from the Union based on the petition that it received in early October from its employees. While I have found Respondent's withdrawing of recognition and, of course, its continuing refusal to meet to be unlawful, in view of my surface bargaining findings that tainted the petition, Respondent had not otherwise dragged its feet in scheduling sessions or cancelling sessions and the primary vice in Respondent's conduct lies not in the difficulty of getting Respondent to the bargaining table but what it did when it got there. *Universal Fuel Inc.*, 358 NLRB No. 150 slip op at 2 (reversing ALJ's decision to order scheduling remedy requested by General Counsel). See also *Myers Investigative & Security Services*, 354 NLRB 367 (2009).

General Counsel also requests that the notice to employees be read to employees during working hours by Sonny Kim in English, Spanish and Korean. I find such an enhanced remedy not to be warranted as this case does not contain pervasive and outrageous unfair labor practices committed by members of high-level management officials. *Fallbrook Hospital*, supra, 360 NLRB No. 73, ALJD slip op at 15. Cf. *Federated Logistics & Operations*, 340 NLRB 255, 256-258 (2003) and *Homer D. Bronson & Co.*, 349 NLRB 512, 515 (2007), where such remedies were found appropriate.

On these findings of fact and conclusions of law and based on the entire record, I issue the following recommended.[29]

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Continued

ORDER

The Respondent, Golden Farm Brooklyn d/b/a Golden Farm Grocery, Brooklyn, New York, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Failing and refusing to meet with and bargain in good faith with the Union, Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers, as the exclusive collective bargaining representative of the employees in the bargaining unit.

(b) Withdrawing recognition from the Union as the exclusive collective bargaining representative of its employees in the bargaining unit.

(c) Threatening its employees with termination with the futility of their support for the Union and ordering or directing its employees to cease speaking with union representatives or with other employees, who are supporters of the Union.

(d) Engaging in surface or bad faith bargaining with the Union as the certified exclusive representative of employees in the appropriate unit.

(e) In any like to related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain in good faith with the Union as the exclusive collective bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular and full-time employees, including cashiers, clerks, stock persons, drivers and general merchandise handlers, employed by Respondent, at its Brooklyn, NY facility, excluding managers, buyers, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as

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Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 27, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on September 20, 2012 is extended for a period of one year commencing from the date on which the Respondent enters into negotiations with the Union.

Dated, Washington, D.C., July 1, 2014.

_____
Steven Fish,
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to meet with or bargain in good faith with the Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers as the exclusive collective bargaining representative of our employees in the bargaining unit.

WE WILL NOT threaten you with termination because of your support for the Union or threaten you with futility because of your support for the Union by informing you that we will never sign a contract with the Union or direct you not to speak with union representatives or with employees, who support the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of rights guaranteed you in the exercise of the rights listed above.

WE WILL, on request, meet and bargain with the Union as the exclusive collective bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All regular and full-time employees, including cashiers, clerks, stock persons, drivers and general merchandise handlers, employed by us, at our Brooklyn, NY facility, excluding managers, buyers, office clerical employees, guards and supervisors as defined in the Act.

Golden Farm Brooklyn Inc. d/b/a Golden Farm Grocery
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-112315 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.